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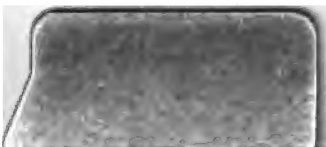
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T H E

ONTARIO REPORTS,

VOLUME IV.,

CONTAINING

**REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS**

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

**WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.**

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BARRISTERS-AT-LAW.

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OF THE
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DURING THE PERIOD OF THESE REPORTS.

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ERRATA.

At page 127 for "sec. 161" in first line of head-note, read "sec. 111."

At " 265 for "41 Vic." in second head-line, read "40 Vic."

At " 407 for "lien" in line 13, and in line 19 of head-note, read "lieu."

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS.

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[CHANCERY DIVISION.]

THE CORPORATION OF THE VILLAGE OF BRUSSELS
V. RONALD ET AL.

*Mortgage—Forfeiture—Condition to carry on factory—Municipal law—
R. S. O. ch. 174, sec. 454.*

Where the plaintiffs, a municipal corporation, passed a by-law to raise \$20,000, to be given to the defendant to aid him in carrying on certain manufactures in the municipality, subject to a condition that he should give a mortgage on the premises for \$10,000, and a bond for a further sum of \$10,000, which said securities should be conditioned for the carrying on of such manufactures for twenty years, and that during the said period he should keep invested at least \$30,000 in the factory; and the defendant gave the bond and mortgage, conditioned as agreed, but the latter not specifying for what sum it was a security, and invested the \$30,000, but did not carry on the manufactures as agreed:

Held, that R. S. O. ch. 174, sec. 454 authorized the taking of the mortgage by the corporation: that it must be taken to be not a charge for any specific sum, but a security for any damages the plaintiffs might have sustained by the defendant's default, to an extent not greater than \$10,000; that the Court would relieve against a forfeiture of the estate; and there should be a reference to ascertain the amount of the said damages, and on non-payment, a sale of the premises.

THIS was a suit brought by the corporation of the village of Brussels against John D. Ronald, and Laura G. Ronald.

In their bill of complaint the plaintiffs set up the by-law, bond, and mortgages mentioned in the judgment of Proud-

foot, J., and prayed that the equity of redemption in the lands and premises therein might be foreclosed: that they, the plaintiffs, might have judgment and execution against the defendant John S. Ronald, for the amount due to them under and by virtue of the thereinbefore mentioned bond, and being the sum of \$10,000 therein mentioned: that the defendant John D. Ronald might be restrained by the order and injunction of the Court from removing certain machinery and tools from the mortgaged premises: that all necessary enquiries might be made and accounts taken, and for general relief.

The facts of the case sufficiently appear from the judgment of Proudfoot, J., and the foot-notes appended thereto.

The case was heard before Spragge, C., at Goderich, on April 20th, 1881, who, after hearing the evidence, retained the bill for six months, to afford an opportunity to the defendant John D. Ronald to perform his agreement with the plaintiffs.

Now, on March 21st, 1882, the case came up again on motion for judgment before Proudfoot, J.

J. Macdougall, for the plaintiffs. The plaintiffs are entitled to a foreclosure, and are not bound to have a sale: *Orford v. Bailey*, 12 Gr. 276. Even conceding that Spragge, C., was right in the view that the \$30,000 had been invested, yet the defendant John D. Ronald, had failed in the other branch of his undertaking, viz., to carry on the manufacture of agricultural implements; and if there has been a breach of the provisions of the mortgage, there has also been a breach of the conditions of the bond. As to the mortgage for \$3,000, that was merely additional security for so much of the \$20,000 as was applied in building the house. The statute authorized the plaintiffs to take such a security, and hence this case is distinguishable from *Brown v. McNab*, 20 Gr. 179.

Bruce, for the defendants. The Municipal Act provides for two kinds of security: (1) security for money; (2) security for the observance of conditions. This is a case

of the latter, and falls under R. S. O. ch. 174, sec. 454, sub-sec. 5, *b*. But this section does not apply to taking security by mortgage: *Brown v. McNab*, 20 Gr. 179. And even if a mortgage was a proper form of security, what is the remedy? The only remedy is damages; it cannot be foreclosure. For there are several things agreed to be done, and is a breach of any one of them to incur forfeiture? I refer to *In re Newman*, L. R. 4 Ch. D. 724. Besides there has been a substantial compliance with the agreement to manufacture, and therefore only damages should be given. As to the \$3,000 mortgage, that was not given under the by-law at all. The premises mortgaged are different. Moreover, if the \$30,000 was invested, there could be no reason for giving this mortgage; since, although a part of the money had been used for building the house, still the defendant, J. D. Ronald has invested more than an equivalent for the bonus. The plaintiffs had no right to insist on an investment of \$3,000 beyond the sum provided in the by-law. We ask by way of cross-relief that this mortgage of \$3,000 be given up to be cancelled. The agreement between the plaintiff and the defendants must receive a reasonable construction; and the defendant has honestly endeavoured to fulfil his part, and this is important evidence if the only remedy is damages. Besides, the mortgage is not in accordance with the by-law. For the by-law provides that the defendant shall give a first mortgage on the premises for \$10,000, but this mortgage is not restricted as to amount. If it is good, however, it is only as security for \$10,000. I also cite *McGee v. Lovell*, L. R. 7 C. P. 107; *Rob. & Joseph*, Dig. p. 2473.

May 18th, 1882. PROUDFOOT, J.—The Corporation of the village of Brussels submitted to the ratepayers a by-law to raise \$20,000, to be given as a bonus to the defendant to aid him in the manufacture of steam fire engines and agricultural implements in the village of Brussels, subject to the condition that he should execute and deliver to the reeve on behalf of the municipality a

first mortgage upon the premises for the sum of \$10,000, and also a bond of himself personally for the further sum of \$10,000, which mortgage and bond were to be conditioned for the carrying on of said manufactures for the term of twenty years next ensuing the date thereof, without interruption for a longer period than three months at any time, unless in case of such loss by fire as shall render such interruption unavoidable, but in no case for a longer period than twelve months; and that he should at all times during the continuance of the said term of twenty years have and keep invested in the said manufactory in the premises and plant thereof at least the sum of \$30,000, and should immediately upon the execution thereof insure the buildings and plant against fire in some company to be approved of by the municipality, in favour of the municipality, for the sum of \$10,000, and keep the same so insured during the said term; the loss, if any, to be made payable to the municipality.

The ratepayers approved of the by-law, and the council finally passed it on September 2nd, 1878.

The defendant executed a bond on January 27th, 1879, in the penal sum of \$10,000, subject to a condition to be void if the defendant should carry on the said manufactures for twenty years without interruption, &c., and should, during all that time, keep invested in the manufactory and plant \$30,000, but saying nothing about the insurance (a).

(a) The conditions of this bond was as follows :—" Now the conditions of the above bond are such that if, and in case, the said John D. Ronald, or his assigns, shall at all times, during the period of twenty years next after the day of the date hereof, carry on the manufacture of steam fire engines and agricultural implements in the premises aforesaid, without interruption for a longer period than three months at any one time, unless in case of loss by fire as shall render such interruption unavoidable, but in no case for a longer period than twelve months: and further, shall at all times during the said term of twenty years have and keep invested in the said manufactory in the premises and plant thereof, at least the sum of \$30,000, and on payment of taxes and performance of statute labour; then this obligation to be void, otherwise to remain in full force."

The defendant Laura G. Ronald, wife of the defendant John D. Ronald was a party to both mortgages for the purpose of barring her dower.

On the same day the defendant executed a mortgage to the municipality upon the premises, with a proviso to be void in the same terms as the condition of the bond, saying nothing as to insurance, and not specifying that it was to be a security for \$10,000 only.

The municipality, on March 10th, 1879, took a mortgage from the defendant upon other property with a proviso to be void when he should have invested in the manufactory \$3,000, in excess of the money invested by him at the date of the former mortgage. This is said to have been required because the defendant had invested \$3,000 of the money received from the municipality in building a house.

(a)

The case came before Spragge, C., at Goderich, who thought it was not established that \$30,000 were not invested as required by the by-law, but found that the manufacture had not been carried on as required by the by-law, and reserved the question whether the security mentioned in the Statute R. S. O. ch. 174, sec. 454, sub-sec. 5 (b), could be taken on land. He said he was not prepared to say what the remedy of the plaintiff was, and expressed himself as very averse to making a foreclosure by reason of what was done, and retained the bill for six months to enable the defendant to perform the agreement (b).

(a) This second mortgage recited the by-law, and that the mortgagor had executed a mortgage pursuant to the said by-law, and had further agreed to execute a mortgage upon the lands thereafter described, for the purpose therein set forth, and continued as follows:—"Now therefore this indenture witnesseth that in consideration of the delivery by the said mortgagees to the said mortgagor of the debentures mentioned, for the sum of \$20,000 of lawful money of Canada, the receipt whereof is hereby acknowledged, the said mortgagor doth grant and mortgage unto the said mortgagees, their successors and assigns for ever, all and singular, &c. And the said party of the second part hereby bars her dower in the said lands. Provided this mortgage to be void, if and when, the said mortgagor shall have invested in the manufactory aforesaid, the sum of \$3,000 in excess of the moneys by him invested therein, at the date of the mortgage by him executed to the said mortgagees, and hereinbefore referred to, and on payment of taxes and performance of statute labour." Then followed the usual covenants.

(b) As to this the learned Chancellor said: "I am not prepared to say

The defendant has not succeeded in performing the agreement during the six months, and the case has been heard on motion for judgment.

Upon the question of fact I shall follow the conclusion of the Chancellor, that \$30,000 may be taken to have been invested, but that the defendant has failed to carry on the business as required by the by-law.

I think the Municipal Act R. S. O. ch. 174, sec. 454, authorizes taking a mortgage on land. The Act empowers the municipality to take security, and the word is wide enough to embrace a real security: *Fisher on Mortgages*, 3rd ed., vol. I, p. 1; and the Legislature must therefore have intended to remove any incapacity in the plaintiffs to take or hold it. In *Brown v. McNab*, 20 Gr. 179, the defendant was treasurer of a municipality and a defaulter. He executed a mortgage to secure the balance, and thereupon his sureties were discharged. No statute conferred any power on the municipality to take security for such liability, other than the sureties given upon entering into office, and these were discharged.

The first mortgage does not comply with the terms of the by-law, for the liability under it is unlimited, while by the by-law it was only to have been security for \$10,000. If the defendant however chose to enter into such a security, I think it will be good at least to the extent of the \$10,000.

The second mortgage is without consideration, not authorized by the by-law, and must be given up to the defendant, as prayed by way of cross relief.

In regard to the insurance, the securities are not co-

now exactly what course I would think it would be proper to take. I am very averse to making a foreclosure of all this by reason of what is done. It is not the kind of case for redemption. It is more like a case of forfeiture, and where the Court will not relieve from forfeiture, I should rather be disposed to say that it would be reasonable that the man should have an opportunity during the coming season to perform this agreement, to carry it out if it can be done; and the parties may perhaps be able to come to some arrangement to that effect; but then I should expect him to do that according to the letter and the spirit of the agreement that he has entered into."

extensive with the by-law,—neither the bond nor mortgage provide for the mortgagor insuring and keeping insured, and in this respect the plaintiffs would seem to have no charge upon the lands.

The mortgage, I think, creates a charge upon the lands to secure the performance of work and investment of money. But it is not a charge for any specific sum, as none is mentioned in it, and must therefore be taken to be a security for any damages the plaintiffs may sustain from the failure of the defendant to perform his engagement, to an extent not greater than \$10,000. For it cannot have been the intention of the parties that upon failure in some slight particular to comply with the terms of the agreement running over a period of twenty years, that the plaintiffs should be entitled to foreclosure, to become owners of the entire property, without an opportunity for the defendant to redeem. As the mortgage is framed it would appear to provide for a forfeiture of the estate on non-fulfilment of the agreement, a forfeiture that this Court would not enforce, but relieve against.

The cases in which this Court relieves against penalties appear to be applicable. In *Sloman v. Walter*, 1 Bro. C. C. 418, Lord Thurlow states the rule to be, that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred. And the Court will relieve in such a case although the sum be mentioned as liquidated damages: *Kemble v. Farren*, 6 Bing. 141; *In re Newman, Ex parte Capper*, L. R. 4 Ch. D. 724.

In the present case it is perfectly plain that the object of the plaintiffs was to have the manufacturing establishment kept in operation, an effect not likely to be attained by foreclosing the property. Trifling breaches of the agreement of the defendant might occur, that according to the strict terms of the agreement would work a forfeiture; thus the interruption of the work for a day longer than

the three months allowed by the agreement,—or the failure by a small sum to keep invested the \$30,000, specified in the mortgage; but these are just the kind of cases in which this Court was always in the habit of granting relief.

There will be a reference to ascertain the amount of damages the plaintiffs have sustained from the defendants not keeping the works going as required by the agreement, and upon non-payment a sale of the premises. The second mortgage will be delivered up—the costs and further directions reserved. (a)

A. H. F. L.

[CHANCERY DIVISION.]

DOVEY V. IRWIN ET AL.

Pleading—Admission in.

A bill was filed by D. D. against I. and B. (trading as partners), and J. D., alleging a wrongful conversion by I. and B. of certain timber, the property of the plaintiff, and further alleging that J. D. was a party to an agreement set forth therein respecting the sale of the said timber, as a surety only, and claiming the return of the timber, an account, and damages. I. and B. in their answer admitted that the timber had been removed by them, but alleged that it had been in accordance with an agreement entered into by them with J. D., and with A. his assignee, who had proper authority for that purpose:

Held, [reversing the decision of Ferguson, J.] that the whole of the admission was to be looked at, and it was not such as entitled the plaintiff to a decree, because it did not admit a conversion of timber of which the plaintiff was sole owner as alleged in the bill; but, under it, I. and B. might show that J. D. had an interest in the timber, and authority to act for and represent D. D. in the transaction in question.

THIS was a motion by way of appeal to the (Divisional Court of the Chancery Division,) from a certain decree made by Ferguson, J., at the Chancery Sittings, at Lindsay, on November 20th, 1882.

The bill was filed by Donald Dovey, against J. M. Irwin and Gardiner Boyd, carrying on business as a firm, under

(a) This case has been carried to appeal.

the style of Irwin and Boyd, and by amendment the plaintiff added one John Dovey as a defendant. The plaintiff prayed that the defendants Irwin and Boyd might be ordered to return to the plaintiff certain timber property of his, alleged by him to have been wrongfully carried away and converted to their own use by the said defendants, or that the said defendants might be ordered to pay to him the value of the said timber together with damages: and for all proper directions and accounts, and general relief. And by amendment he prayed that it might be declared that the defendant John Dovey or his assignee in insolvency, had no interest in the said timber, and had no power or right to sell the same without his consent, and that the defendants Irwin and Boyd might be ordered to pay him, the plaintiff, for the timber taken by them, at the prices stated in a certain agreement of February 12th, 1878, which the plaintiff set out in his bill, with interest from the time of the wrongful taking by them of the said timber.

The defendant John Dovey put in an answer admitting all the allegations in the plaintiff's bill, and praying to be dismissed with costs to be paid by the plaintiff or by his co-defendants.

The defendants Irwin and Boyd put in joint answers first to the original, and then to the amended bill, and on the strength of certain admissions contained in the third clause of their answer to the amended bill, set out below, the learned Judge of first instance declared the plaintiff entitled to an account of the value of the timber referred to in the said clause, and to payment of the sum thus found, by the said Irwin and Boyd, they to be at liberty to set off the amount paid by them for driving the said timber.

The statements contained in the pleadings are concisely set out in the judgment of the learned Chancellor.

The motion was argued before Boyd, C., and Proudfoot, J., on December 9th, 1882.

H. Cameron, Q. C., for the defendants, (appellants). The whole answer must be read together, and not an isolated part. It sets up a total abandonment of the contract by the plaintiff, and a new agreement with John Dovey. The admissions relied on are contradictory of the plaintiff's case as set forth in the 4th section of his bill. The admission is *not* that the plaintiff delivered or got out this timber. We contradict the plaintiff and set up a different state of affairs: what we got was got under the contract of 1879, and by John Dovey, not by the plaintiff.

S. H. Blake, Q. C., for the plaintiff, (respondent). Is the plaintiff bound to take the whole of the defendant's answer? Can he not take a distinct admission? No evidence can contradict the record while it remains, and there has been no application to amend the pleadings. The plaintiff abandoned part of his claim, as he might do. I refer to *Stickney v. Tylee*, 13 Gr. 193.

H. Cameron, Q. C., in reply. *Stickney v. Tylee*, *supra*, is not in point, because the admission there was an admission of what was pleaded.

February 15, 1883. *BOYD, C.*—The plaintiff's bill is as follows: (1) That the defendants in 1880 wrongfully converted to their own use a quantity of pine and ash timber belonging to the plaintiff. All the rest of the bill is added by amendment, and is substantially as follows:—

Sec. 2 sets out an agreement between the plaintiff and the defendant John Dovey jointly with the other defendants (on February 12th, 1878,) for the making and delivery pine timber at 13 cents a foot, and of ash timber at 10 cents a foot, to be measured and culled by the defendants; to be delivered at the mouth of Nogie's Creek next spring, free of all timber dues—the timber to be marked I. & B. (*i. e.*, defendants' initials,) before being drawn. The defendants therein agree to pay on delivery of the timber to them, and to advance, if required, \$300 before the 1st April next, on satisfactory security being given on the timber or otherwise.

Sec. 3 avers that though John Dovey is a party to the agreement, he was merely a surety, and the plaintiff alone was to do all the work and receive all the money.

Sec. 4 states that the plaintiff did not deliver any timber to the defendant under the agreement, but that the plaintiff, having made a large quantity, brought it to the mouth of Nogie's Creek in the spring of 1880, when it was forcibly taken by the defendants and sold by them without the plaintiff's consent (a).

Sec. 5 offers without prejudice to accept payment for the timber taken at the contract prices.

Sec. 6 sets up that the defendants pretend that they agreed in 1879 with the assignee in insolvency of the defendant John Dovey to get the timber at a reduced price, and that they had the right to take it under this last agreement; but these pretences are met by the allegations that if any such agreement was made it was made without the plaintiff's consent, and that John Dovey and his assignee had no power to make such an agreement, as the defendants well knew (b).

(a) This clause was as follows :

4. Your complainant did not deliver any timber to the defendants, Irwin and Boyd, under the said agreement, but your complainant having manufactured a quantity of board and square pine timber about 6000 feet, and a quantity of black ash timber, about 1000 feet, brought the same to the mouth of Nogie's Creek, mentioned in the said agreement, in the spring of the year 1880, when the defendants, Irwin and Boyd, took forcible possession of the said timber, and put your complainant's workmen off the same, and the said Irwin and Boyd then took the said timber to the market and sold it without the consent of your complainant.

(b) This clause was as follows :

6. The said defendants, Irwin and Boyd, pretend that they made an agreement in the year 1879, with one Alexander McAlpine, the assignee of the estate of the above named John Dovey, who was then an insolvent, whereby they were to get the said timber at a reduced price, and that they had the right to take the said timber under this last agreement; but your complainant asserts and the fact is, that if any such after agreement was made by the said John Dovey, or the said McAlpine as assignee, with the said defendants, it was made without your complainant's knowledge or consent, and the said John Dovey or the assignee of his estate had no power or authority to make such agreement, as the defendants Irwin and Boyd well know.

The answer to the amended bill admits the joint agreement in the second section, denies the third section, and in answer to the fourth and sixth sections states (c) that the plaintiff and John Dovey immediately after the agreement got out timber, a large part of which was drawn by them to the mouth of Nogie's Creek, and measured and marked with the defendants' mark, and the defendants advanced \$220 on account of the price, and that after some part had been so delivered the defendant John Dovey became insolvent, and the plaintiff left the province and failed to carry out the agreement, and did not repay the advances,

(c) This clause was as follows :

3. In answer to the 4th and 6th paragraphs of the said amended bill we say as follows : That in pursuance of the agreement set out in the 2nd paragraph of the said amended bill, the said plaintiff and said the defendant John Dovey, immediately after the making of the said agreement, got out a quantity of timber, a large portion of which was drawn by the said plaintiff and the said defendant, John Dovey, to the mouth of Nogie's Creek, and measured and marked with the mark ordinarily used by us in marking our timber, and we, in accordance with the said agreement, advanced to them sums of money, amounting together to the sum of \$220, on account of the purchase money of the said timber. That after some portion of the said timber had been delivered at the mouth of Nogie's creek, the said John Dovey became insolvent, under the then existing laws relating to insolvent debtors, whereby his estate and effects became vested in one McAlpine ; and the plaintiff left this province and failed to carry out the said agreement, in consequence whereof we incurred loss and damage, and they did not repay to us the advances made by us under the said agreement, whereupon, that is to say, on or about the month of March 1879, we took possession of the said timber, and made an attempt to drive the same, but discontinued our efforts for that season : that in the month of April 1879, we entered into an agreement between the said McAlpine, and the said defendant, John Dovey, of the one part and ourselves of the other part, whereby, (in consequence of such timber having fallen and the value of that manufactured having depreciated owing to exposure) the prices to be paid for said timber got out or to be got out under the said agreement were reduced, and we were put at liberty to drive the said timber ourselves and charge against the same the expenses of so doing, to which last mentioned agreement we crave leave to refer for greater certainty; and we say that we are advised and believe that the said McAlpine and John Dovey had full power and authority to make the said agreement with respect to the said timber : that pursuant to the said agreements we drove the said timber in or about the month of May 1880.

whereupon the defendants in March, 1879, took possession of the said timber and attempted to drive the same, but discontinued this; and that in April, 1879, it was agreed, between John Dovey and his assignee McAlpine, in consequence of fall of price and depreciation of the timber, to reduce the price, and the defendants were to be at liberty to drive the timber and charge expense against it; and they allege that John Dovey and his assignee had full power to make such agreement, pursuant whereunto they drove the timber in May, 1880. The fourth section of the answer expresses willingness to pay for timber to the person or persons entitled thereto the balance of price under the said agreement (meaning, I suppose, the latter agreement reducing the price as is alleged.) (*d*).

Upon the admissions in the first part of the third section of the answer the learned Judge, without evidence, decreed for the plaintiff and directed a reference to ascertain the value of the timber therein admitted to be taken.

It does not appear to me that there is a sufficient admission of the plaintiff's cause of action to justify such a judgment.

The plaintiff pleads that there was no delivery to the defendants of any timber, and by the terms of the first contract payment was to be made on delivery to the defendants. By the defence there was no taking possession of

(*d*) This clause was as follows :

That we have always been ready and willing to pay to the person or persons legally entitled to receive the same, and before the commencement of this action offered to pay to Messrs. O'Leary and O'Leary, who were then acting for both the plaintiff and the said defendant John Dovey, to be paid to whichever of them was entitled to receive the same, the balance of the purchase money of the timber received by us under the said agreement, at the prices fixed by the second agreement, after deducting therefrom the amount of their said advances, and the expenses we have been put to in driving the said timber; and we now submit to carry out the said offer, save that we now claim a further reduction as compensation for the loss sustained by us, owing to the non-performance of the first mentioned agreement and loss of the profit we might and could have made on such sale had the quantity contracted for been delivered to us in accordance with the said agreement.

any of the timber till after the insolvency of the defendant Dovey, and about March, 1879. This was on the ground that default had been made in the contract, and that the defendants had not been repaid their advances. The timber was seized to make good the alleged loss and damage of the defendants and the advances. The plaintiff can of course forego his right to an account for anything beyond this; but even as to this it is not admitted that he has the right to recover.

The answer proceeds on the theory of a joint contract for the timber made with the plaintiff and the defendant John Dovey. The contract set out in the bill indicates *prima facie* the same fact as to a joint contract. The plaintiff by his pleading gets rid of this, but the onus is on him by evidence to substantiate that the defendant Dovey is not interested, and that the whole cause of action is in the plaintiff. All that the answer admits is, that when the defendant took possession of some of the timber in March, 1879, it was as the joint property of the plaintiff and the defendant John Dovey; and the same paragraph which contains this admission goes on to shew that before the defendant had driven the timber a new agreement was made in April, 1879, by which the price of the whole was reduced, and then under that agreement the defendants proceeded to drive the timber in May, 1880. They aver that the reduction of price was made by the defendant Dovey, and his assignee, having power so to do. It seems to me the issue is thus presented, which must be disposed of by means of evidence before it can be said that the plaintiff is entitled to a decree.

The whole of this admission should be looked at according to the rule in *Rude v. Hitchurch*, 3 Sim. 562, that the *substance*, and not merely the grammatical connection or form is to be regarded as the criterion of the extent and scope of the admission. The admission is substantially this: that the defendants took possession temporarily of certain timber, the joint property of the plaintiff and the defendant Dovey, and that before they took permanent posses-

sion of such joint property they agreed with the defendant Dovey for a reduction of the price by an agreement which he had the power to make, and under which they acted: *Freeman v. Tatham*, 5 Ha. 329. If the plaintiff proves the fact alleged by him that he was the sole owner, that would probably throw the onus on the defendants of making out their defence. But in the absence of any evidence, I see no admission of any cause of action in the plaintiff suing alone upon a contract made by the defendant with him and another as joint contractors.

Considering all the circumstances, and that the defendant has been heard on this motion *ex gratia*, the costs of this application should be reserved, to be disposed of at the hearing; the present judgment being set aside for the purpose of the production of evidence at the place of trial.

PROUDFOOT, J.—By the original bill the plaintiff sued the defendants Irwin and Boyd, for carrying away and converting to their own use a large quantity of timber. The defendants Irwin and Boyd, by their answer denied the allegations in the bill, and said they were not guilty of the wrongful acts complained of.

The plaintiff then amended his bill, making John Dovey a defendant, and setting out that a contract had been made on July 12th, 1878, by the plaintiff and John Dovey, with Irwin and Boyd, for the sale and delivery of timber to them at 13 cents per cubic foot for pine, delivered at the mouth of Nogie's Creek, and 10 cents for black ash. He alleges that John Dovey was only a surety, and had no interest in the undertaking. He further says that he delivered no timber under the agreement, but having manufactured a larger quantity of pine and black ash, brought it to the mouth of Nogie's creek, in the spring of 1880, when Irwin and Boyd took forcible possession of it, carried it to market and sold it. But offers without prejudice to accept payment for it at the price named in the agreement.

In answer to the amended bill the defendants admit the agreement of February 1st, 1878, but deny that John

right in the plaintiff alone to sue for it. There is no admission there of the carrying off of the timber. Nor does the second claim of this paragraph go much further, as it only admits an attempt to carry it off, which was for the time abandoned. The third clause of this paragraph does admit carrying it off, but only under an agreement with John Dovey and McAlpine, which Irwin and Boyd believe John Dovey and McAlpine had full power to make.

None of the admissions concede any several right in the plaintiff to the timber, and if it is the fact that John Dovey had no interest in it, and was only a surety, it has to be established by evidence. The carrying off and converting are matters equally essential to the plaintiff's right to recover, but the admission of them seems so interwoven with the alleged agreement with John Dovey and McAlpine, that it must be taken in connection with the agreement and the alleged authority to make it.

Upon both these grounds, but especially on the former, I think the defendants do not admit enough to entitle the plaintiff to a reference, and there must be a new hearing.

A. H. F. L.

[CHANCERY DIVISION.]

BOYS' HOME OF THE CITY OF HAMILTON V. LEWIS ET AL.

Will—Gift to trustees as a class—Construction—Compensation to executors in addition to bequest of residue—Interest on balance retained by executors.

Where a testator, after devising certain lands to "my trusty friends J. L. and R. M." on certain trusts for the maintenance and education of his son, J. E., and devising the residue, real and personal, to the said "J. L. and R. M., or the survivor of them," in trust to sell, and distribute the proceeds in payment of certain legacies, therein specified, continued, "should there ultimately be any residue, I direct my said trustees, or the survivors of them, to divide and pay the same to and among my legatees hereinbefore named and my said trustees, or the survivor of them, in even and equal shares and proportions:"

Held, that the trustees took as a class, *i. e.*, one share between them, equal to the shares taken respectively by the legatees; for looking at the whole will, it appeared that the testator was speaking of the trustees in their official capacity, and regarding them as one legal person. It is a principle of construction that the same meaning shall, as far as possible, be given to the same words in the same will.

Where there is a bequest of a share of the residuary estate to executors it is not to be inferred that the bequest was given in lieu of compensation, as in the case of a legacy of a definite sum, but it is nevertheless one of the elements to be considered in dealing with the question of compensation:

Held, that in this case, the executors were entitled to compensation, notwithstanding a bequest to them of a share of the residue, because the amount of the residue was, when the will was made and after the testator's death, a matter of extreme uncertainty; nevertheless, no percentages should be allowed on the share of the residue, which the executors took under the residuary clause in the will.

Held, also, that the executors, in this case, should be charged with interest upon the residue in their hands after the time when it was distributable: and the annual rate of interest charged accordingly upon it from the time when it might properly have been distributed, or appropriated, down to the time of its actual payment, or if not yet paid down to the present time.

THIS action was brought by the Boys' Home of the City of Hamilton, as plaintiffs, against John Lewis and Robert Morgan, defendants, for the purpose of having a certain will construed by the Court, and the real and personal estate of the testator administered, and for general relief.

The testator, Daniel Evans, by his will, dated April 29th, 1879,—after devising and bequeathing to "my trusty friends" the defendants John Lewis and Robert Morgan, a certain lot of land, in trust, to apply the rents and profits for the maintenance, education and support of the testator's

adopted son, John Evans, till the said son should attain twenty-five years of age, and then to deed it to the said adopted son in fee simple—in the second clause of his will devised and bequeathed the rest of his estates, real and personal, to “the said John Lewis and Robert Morgan, or the survivor of them,” in trust to sell and convert into money, and to distribute the proceeds as thereafter mentioned. And after making certain pecuniary bequests, amongst others one to his sister Rachel Evans, and a legacy of \$500 to the plaintiffs, he continued as follows:

“10. And should there be ultimately any residue or remainder of my said estates after paying the legacies and debts and doing as aforesaid, I direct my said trustees, or the survivor of them, to divide and pay the same to and among my legatees hereinbefore named and referred to, and my said trustees or the survivor of them, in even and equal shares and proportions. And I hereby appoint the above-named John Lewis and Robert Morgan as trustees and executors of and under this my will. In testimony whereof,” &c.

By their statement of claim the plaintiffs set out the terms of the testator's will, and that he died on April 4th, 1880, and the will was duly proved by the defendants as executors: that John Evans, the adopted son of the testator, died about October 12th, 1881, aged fourteen years and no more; and sundry other facts not material to mention here; and claimed to have the will construed and the estate administered by this honourable Court.

By their statement of defence, the defendants alleged that they had to the best of their ability endeavoured to execute the trusts of the will, but in consequence of certain doubts therein mentioned, as to the proper construction of the will, they had been unable to determine amongst whom and in what proportions they should divide and pay over the residue of the said estate; and they submitted to the guidance and direction of the Court.

By decree made by Boyd, C., on November 22nd, 1882, the Court referred it to the Master of this Court at

Hamilton, to make all inquiries and take all accounts and proceedings necessary for the administration of the estate, and for the adjustment of the rights of all parties, and reserved further directions and the question of costs till after the said Master should have made his report.

The Master made the said legatee, Rachel Evans, a party in his office, and by his report dated February 5th, 1883, he found, amongst other things, as follows :

" 10. I find that the executors realized from the real and personal estate of the said testator the sum of \$20,662.85, and that they have properly paid out and disbursed for and on account of the said estate the sum of \$3,434.58, leaving the sum of \$17,228.27, from which must be deducted the sum of \$826.51, which I have allowed the said executors, as a compensation for their personal services, loss of time, &c., in the management of the said estate, in addition to the bequest to them contained in the said testator's will, leaving the sum of \$16,401.76, as the residue of the said testator's estate for distribution amongst the parties entitled under the said will.

" 11. I find of such residue the plaintiffs are entitled to one-third thereof, amounting to the sum of \$5,467.25, the defendant Rachel Evans to one-third thereof, amounting to the sum of \$5,467.25, and the executors, the defendants Lewis and Morgan together, to one-third thereof, amounting to the sum of \$5,467.25."

The following objections were now raised to this report of the Master. The defendants John Lewis and Robert Morgan objected on the ground, as set out in their objections as filed : "That they, the said John Lewis and Robert Morgan, should have been allowed each one-quarter of the residuary estate, instead of one-sixth each, or one-third between them, as appears by the said report, that is, that each should have a share in the said residuary estate equal with each of the other residuary legatees under the will of the testator."

The defendant Rachel Evans also objected to the said report, on the following grounds :

"1. The said Master should have charged the executors, the defendants Morgan and Lewis, both, interest at the rate of six per cent. per annum on all sums from time to time in their hands belonging to the estate of the late Daniel Evans not deposited in bank.

2. That the said Master in adjusting the accounts of the said estate should have charged the defendants Morgan and Lewis with interest at six per cent., on the respective sums of \$1047.62, and \$1981.78, being the amounts retained by the said executors on account of their share in the estate, and applied to their own use, over and above the amount paid to the defendant Rachel Evans, (a).

3. That the said Master should not have allowed the said executors any commission for their management of the said estate, as the legacy they receive under the will was in satisfaction thereof."

The appeals on these objections came up for argument before Boyd, C., on Thursday, March 8th, 1883.

S. H. Blake, Q. C., for John Lewis and Robert Morgan. As to the division of the residuary estate, it should have been into fourths instead of into thirds. The word "survivors," in the tenth section of the will, refers to legatees as well as trustees, and the distribution should be made equally. This is not a gift to the trustees by way of remuneration as trustees. If it is not given to the legatees as a class, neither is it given to the trustees as a class: *Re Gibson's Trusts*, 2 J. & H. 656, 661, 663; *Jarman on Wills*, 4th ed., 342; *Knight v. Gould*, 2 My. & K. 295; *Barber v. Barber*, 3 My. & Cr. 688, 697-9; *Hoare v. Osborne*, 33 L. J. N. S. Ch. 586. As to the meaning of "survivor," I refer to *Badger v. Gregory*, L. R. 8 Eq. 79; *Bowers v. Powers*, *Ib.* 283; *Habergham v. Ridehalgh*, L. R. 9 Eq. 400; *Re Palmer's Settlement Trusts*, L. R. 19 Eq. 320; *Browne v. Rainsford*, Ir. R. 1 Eq. 384. As to the compensation

(a) Nothing appeared in the Master's report as to these sums so alleged by the defendant Rachel Evans to have been retained by the executors and applied to their own use. R&P.

allowed to the trustees, the compensation given is not excessive, and they are entitled to the legacy in addition: *Cockerell v. Barber*, 1 Sim. 23. The executors should not be charged with interest.

R. Martin, Q. C., for Rachael Evans. The gift is not to the executors *nominatim*, neither are the executors entitled to take beneficially: *Williams* on Executors, 8th ed., vol. 1, p. 249; *Bridge v. Yates*, 12 Sim. 648; *Stackpoole v. Howell*, 13 Ves. 417; *Piggott v. Greene*, 6 Sim. 72; *Abbot v. Massie*, 3 Ves. 148; *Hanbury v. Spooner*, 5 Beav. 630; *Re Hawkin's Trusts*, 33 Beav. 570; *Angermann v. Ford*, 29 Beav. 349; *Lewis v. Mathews*, L. R. 8 Eq. 277; *Ripley v. Waterworth*, 7 Ves. 438; *Meryon v. Collett*, 8 Beav. 386; *Trethewy v. Helyar*, L. R. 4 Ch. D. 53; *Thorpe v. Skillington*, 15 Grant 85; *Mackenzie v. Mackenzie*, 3 McN. & G. 559; *Long v. Watkinson*, 17 Bea. 471. As to the executors not getting compensation as well as their legacy, I refer to *Piggott v. Greene*, 6 Sim. 74. *Primâ facie* the legacy is as compensation for their trouble: *Denison v. Denison*, 17 Gr. 310. As to the question of charging interest, I refer to *Gould v. Burritt*, 11 Gr. 523. I also refer to *Freeman v. Fairlie*, 5 Mer. 24; *Milner v. Lord Harewood*, 18 Ves. 273.

Gibson, for the plaintiff, referred to *Williams* on Executors, 7th ed., p. 1467, and contended that the trustees took as joint tenants or as a class, even without the word "survivor."

S. H. Blake, Q. C., in reply, referred to *Griffiths v. Pruett*, 11 Sim. 202; *Christian v. Devereux*, 12 Sim. 264; *Hawkins* on Wills, p. 112; *Williams* on Executors, 8th ed., 1287, and 1290-1.

March 14th, 1883, BOYD, C.—I am unable to distinguish this case as to the construction of the tenth clause, and the intention of the testator to be collected from the whole will, in any material point, from the decision in *Knight v. Gould*, 2 My. & K. 295. The *ratio decidendi* is thus expressed in a summary of the case by Malins, V. C., in *Re Smith's Trusts*,

L. R. 9 Ch. D. 121." There was a bequest of 'a residue ' to my executors hereinafter named equally between them,' and that was followed by the appointment of three executors, one of whom died in the lifetime of the testatrix. The Master of the Rolls held that the two survivors took the whole, and his decision was affirmed by Lord Chancellor Brougham. I think there is no doubt that this decision turned upon the official capacity of the executors." *Knight v. Gould, supra*, is also analysed by Cottenham, L. C., in *Barber v. Barber*, 3 M. & Cr. 698, who says that the decision of Lord Brougham is based on " two grounds principally, *first*, that the persons to take were those who were to perform the duties, and the survivors were such persons ; *secondly*, that the gift was to the executors as a class in terms, for the words ' hereinafter named ' were mere surplusage, inasmuch as the result would have been the same if they had been omitted, it being absolutely necessary to name them in order to appoint them." In *Hoare v. Osborne*, 12 W. R. 397, Kindersley, V. C., does not agree with this second ground of decision as put by Lord Cottenham, but deals with *Knight v. Gould*, as having been decided as a gift to a class by reason of the words in the bequest " to enable them to pay debts, legacies, &c., and also to recompence them for their trouble."

The question upon this will is, whether the bequest of the residue is to the trustees as a class or to them personally. If personally, as both are alive at the period of distribution, the division will be into fourths, of which each will get one. If to a class, the division will be as the Master has made it, into thirds, of which one share is allotted to the trustees. So far as the intention of the testator is shewn it is true his will begins by a devise of one parcel of land to his " trusty friends, John Lewis and Robert Morgan," which they are to hold in trust for the benefit of the testator's adopted son, and to apply the rents for his maintenance, education, and support during minority. The son died under age, but the duties of guardianship imposed upon them explain why they are referred to as his friends. The son having died, this land

fell into the residue, as to which the testator employs no expressions other than of a formal legal character, when he defines the duties of the trustees. By the second clause the residue is given to "John Lewis and Robert Morgan, or the survivor of them." This phrase we have twice repeated in the 10th clause of the will, and it is a principle of construction that the same meaning shall, as far as possible, be given to the same words in the same will. These words, in the 10th clause, "my trustees or the survivor," indicate that the testator was dealing with them and speaking of them in their official capacity: *Eaton v. Smith*, 2 Beav. 236. He is directing them in their executorial duties whether one or both act, and treats them as but one legal person. The language of Lord Brougham, in *Knight v. Gould*, 2 My. & K. 302, exactly fits their position; they were the executors or trustees made residuary legatees *qua* executors and trustees, and not as individuals.

But it is argued that this construction should not prevail because of the words "to and among," and "in equal shares," which are found in the context. No force can be attributed to these expressions if the clause is read with a slight transposition of words so as to make plain the testator's meaning. He means to say: "I direct the survivor of my trustees (or both, if alive,) to divide and pay the residue to and among my legatees hereinbefore named, and the survivor of my trustees (or both, if alive,) in even and equal shares." But even if these distributive words are applicable to all, yet the language of Lord Thurlow, in *Frewen v. Rolfe*, 2 Bro. C. C. 224, quoted by Lord Brougham, is pertinent here. "The general intent of the testator will overrule the word 'equally' rather than the word 'equally' shall overrule the general intent of the testator."

The question argued by Mr. Martin, that the trustees do not take the residue beneficially, is set at rest by the case of *Williams v. Arkle*, L. R. 7 H. L. 616.

Upon the manner of division I uphold the Master's report.

As affecting the compensation of the executors there is a difference between a legacy of specific character or defined sum to the executors, and the bequest of a share of the residuary estate. In the former case it is to be assumed that the legacy was given in respect of the trouble to be incurred in the discharge of the executorship—in the latter case, this is not to be inferred, although it is, no doubt, one of the elements to be considered in dealing with the question of compensation. The residue here is not bestowed in terms as remuneration for the duties of the executors, as in *Freeman v. Fairlie*, 3 Mer. 24; and *Denison v. Denison*, 17 Gr. 306. It is taken by the executors, not as undisposed of personal estate which under the earlier cases would fall to them by implication of law, but because of the express bequest to them as a class. The decisions have left the law in a very unsatisfactory state as to the effect of the bequest of a residue to executors. I refer to *Parsons et al v. Saffory et al.*, 9 Price 578; *Griffiths v. Pruett*, 11 Sim. 202, and *Christian v. Devereux*, 12 Sim. 264, as compared with *Compton v. Bloxham*, 2 Coll. 201, and *Hoare v. Osborne*, 12 W. R. 397. Considering the state of the authorities, I think the proper conclusion is, that it cannot be said in this case that the testator intended by the share of the residue to compensate his executors, because the amount of the residue was when the will was made, and after his death, a matter of extreme uncertainty. As I gather from the evidence, by far the largest part of it has accrued from the death of beneficiaries after the testator's death. Assume the case that both executors discharged all the duties of the office up to the time when but little was left to be done in order to ascertain the residue, and then one died. By the terms of the will his death before the period of distribution would, as conceded, disentitle him to share in the residue, but it would not preclude his representatives from recovering a proper proportion of compensation under the statute upon its being awarded. The commission to executors is viewed as part of the expenses of administration,

which have to be defrayed before the residue can be ascertained: *Harrison v. Patterson*, 11 Gr. 105, 112.

And in the case of a legacy to executors expressly for their trouble, it is decided that if there is a deficiency of assets it does not abate with other legacies which are mere bounties: *Anderson v. Dougall*, 15 Gr. 407. This benefit would not result if a gift of residue was held to oust the right to compensation. Having regard to all these considerations, I am not disposed to interfere with the Master's decision as to the commission—beyond this, that no percentages should be allowed on that share of the residue which the executors retain under the residuary clause of the will, and to this extent the amount allowed should be reduced.

The next ground of appeal is, on the question of interest. By the usual course of the Court, interest is not chargeable against an executor till after the end of the first year. *Prima facie* the fund is then distributable, and if he keeps moneys thereafter in his hands without reason he will be charged with interest. The pendency of an administration suit (*Holgate v. Haworth*, 17 Beav. 259), the retention of the moneys, though the executor has not used the fund in business (*Dawson v. Massey*, 1 B. & B. 230), the withholding on the ground of uncertainty as to claims upon the fund, or as to who is entitled to it, and giving notice to beneficiaries who abstain from asking for an appropriation or an investing of the money (*Melland v. Gray*, 2 Coll. 295; *Mousley v. Carr*, 4 Beav. 49), readiness and willingness to pay, but inability to do so till it should be ascertained by decree of the Court who are the parties entitled, (*Sutton v. Sharp*, 1 Russ. 146): none of these reasons exempt the executor from paying interest on moneys which he has kept unproductive to the beneficiaries. In *Re Evans' Estate*, *Evans v. Evans*, 1 W. N. 1876, p. 205, administrators who claimed to be beneficially entitled to funds in their own hands and failed for want of evidence, were charged with interest. In cases of improper retention of balances the Court awards interest, when the sums are of a considerable

or substantial amount: *Jones v. Morrall*, 2 Sim. N. S. 241. There is no good reason for not charging the executors with interest in this case upon the residue in their hands after the time when it was distributable. As the residuary estate was ascertained or got in from time to time it became money in their hands held for the use of residuary legatees. The annual rate of interest should be charged upon it from the time it might properly have been distributed or appropriated down to the time of its actual payment, or if not yet paid, down to the present time. If there is any trouble or disagreement as to the dates, it will have to go back to the Master. As success in the appeals is divided, and the will is a difficult one, I think it is not a case for costs as to any of the appeals.

A. H. F. L.

[CHANCERY DIVISION.]

CLOUSE V. CANADA SOUTHERN RAILWAY COMPANY.

Railways—Farm crossings—Purchasing agent of railways—Executed agreement—Injunction—C. S. C., ch. 66, sec. 13 seq.—41 Vic. ch. 27, D.

Where the defendants, a railway company, through their right of way agent, purchased certain land for the railway from the plaintiff, and verbally agreed with him at the time to make and maintain certain over and under crossings across the railway to be built on the land so purchased, whereupon the plaintiff conveyed the land to them, for a less sum than he otherwise would have done, and for more than ten years the defendants maintained the crossings as agreed, but afterwards caused some to be filled up or obstructed:

Held that, whether the agent had authority to make such an agreement or not, the plaintiff was entitled to damages and an injunction to restrain the defendants' from interfering with the crossings, for the company had recognised the agreement, and adequate compensation could not be given to the plaintiff in damages, and, moreover, farm crossings, when once made by a railway company, must, under C. S. C. ch. 66, sec. 13 *seq.*, which was incorporated in the defendants' charter, be maintained by it, and this independently of any agreement for permanent maintenance, although it is otherwise as to stations.

Held, also, that 41 Vic. ch. 27, D., does not give the mortgagees, under the arrangement sanctioned thereby, any power to destroy a farm crossing given in consideration of the purchase of land by the railway, or authorize them to interfere with rights which the railway company are bound to respect.

Seemle, that public convenience could not prevail over the plaintiff's private rights.

Seemle, also, that agents for the purchase of the right of way for railways, have, as naturally incident to their appointment as such agents, power to agree what crossings shall be given.

Jessup v. Grand Trunk R. W. Co., 7 App. 128, and *Schliehauf and Oxford v. Canada Southern R. W. Co.*, 28 Gr., 236, distinguished.

THIS was an action brought by one George Clouse against the Canada Southern Railway Company, for damages, and an injunction under the following circumstances:

In his statement of claim the plaintiff alleged that he was a farmer residing in the township of Townsend, in the county of Norfolk, and was in 1871 seized of certain lands, as to some seven acres of which he did in March of that year enter into a verbal agreement with the defendants, through one Tracey their agent, for the sale thereof to them, for the purposes of their railway, for a sum of \$662; and it was then agreed that the defendants should make five

farm crossings across that part of their railway to be built on the land so sold: that three of such crossings should be level crossings, and the other two under-crossings, and that one of such under-crossings should be of sufficient height and width to admit of the passage through it from one part of the plaintiff's farm to the other of loads of grain and hay, and reaping and mowing machines, and that such crossings should be kept and maintained for all time by the defendants for the use of the plaintiff, his heirs and assigns: that the only reason why the said agreement was not at the time of its making reduced into writing was, because the said Tracey assured him, the plaintiff, that a writing was unnecessary, for that the law would compel the defendants to build and maintain the said crossings, although the agreement with reference thereto was not in writing; and he believed these representations, and relying thereon did not further insist on the agreement being in writing: that in pursuance of the agreement, by deed of March 16th, 1871, he conveyed the said land to the defendants, who took possession, and conformed to the terms of the said verbal agreement as to the said farm crossings and otherwise until October 8th, 1881, when the defendants caused the larger of the said two under-crossings to be boarded up so as to render it impassable by and useless to him, the plaintiff, and on several occasions since the defendants had caused the said under-crossings to be partly filled up with earth and rubbish, and he, the plaintiff, had been put to great trouble and expense in removing such earth and other obstructions from the said under-crossings, and rendering them fit for use by himself. And the plaintiff claimed damages for the wrongs complained of, and an order restraining the defendants from any repetition of any of the acts complained of, and general relief.

By their statement of defence, the defendants admitted the taking of the plaintiff's land for their right of way, and also that the said Tracey was a purchasing agent of theirs for rights of way, but denied that he did make or had authority to make the promises alleged by the plaintiff as

to the crossings, or that the plaintiff was entitled thereto. They also alleged that the sum paid to the plaintiff was not merely for the expropriation of his land, but was also for all damages to his property through which the right of way was taken in so far as it was injuriously affected: that they did not furnish the under-crossings referred to by the plaintiff in pursuance of any agreement whatever: that at the places where the two alleged under-crossings were there were depressions in the ground, which they, the defendants, bridged over instead of filling up, for economy, intending that these and similar other depressions along the line of their railway should be filled up with earth as soon as they should have the means to do so, and the superstructures over such depressions should require renewal: and although they were always ready and willing to allow land owners to use these places as under-crossings, and afforded them facilities for using them as such, it never was their intention that the plaintiff or persons similarly situated should have the right to use these crossings permanently: that they had furnished the plaintiff with good and suitable over-crossings, and denied they were legally bound to furnish him with any others: that the plaintiff had been guilty of such laches as to disentitle him to relief; and they also pleaded the Statute of Frauds.

The case was heard at the sittings of this Court, at the town of Simcoe, on October 10th, 1882, before Proudfoot, J.

James Robb, for the plaintiff. The agreement alleged is clearly proved, and it has been so far performed as to get over the objection of the Statute of Frauds. The easement granted was an easement in perpetuity. I refer to *Craig v. Craig*, 2 App. 583.

A. J. Cattanach, for the defendants. Even if Tracey made the bargain alleged, it was not a permanent one; there was no covenant to maintain the crossings. In the case of stations, railway companies are not bound to keep them permanently on the same spots. At all events Tracey had

no authority to make such an arrangement as that alleged by the plaintiff. Then the agreement alleged was not in writing. The crossings were never intended to be permanent. The plaintiff is only entitled to damages, if to anything at all. I refer to *Jessup v. Grand Trunk R. W. Co.*, 7 App. R. 128; *Schliehauf and Oxford v. The Canada Southern R. W. Co.*, 18 Gr. 236.

James Robb, in reply. Any question of cost to the company, or convenience of the public, forms no defence: *Greene v. West Cheshire R. W. Co.*, L. R. 13 Eq. 44; *Raphael v. Thames Valley R. W. Co.*, L. R. 2 Ch. 147. As to *Jessup v. Grand Trunk R. W. Co.*, *supra*, it tells in our favour rather than the reverse.

October 10th, 1882. PROUDFOOT, J.—I have no doubt whatever that the bargain was made as the plaintiff has said—that he really did enter into an agreement for \$650, and the plaintiff had asked a larger sum, and was induced to reduce the amount by this consideration. Mr. Tracey may have forgotten it in the multiplicity of his transactions, but it was different with the plaintiff and his sons; it was the only transaction of the kind they ever had, and they were interested in it. The farm buildings were all on one side of the track, and the main building on the other, and it was therefore of the greatest importance to them that they should have a means of communication between the two portions of the establishment. The most material evidence on the point is afforded by the memorandum book which Tracey himself kept. The memorandum is perfectly clear:—"Settled with Clouse for the right of way; he can have one pass under the bridge."

It seems to me perfectly conclusive that there was an agreement between the plaintiff and Tracey of the nature that the plaintiff and his sons and Boughner^(a) has sworn to. Boughner is altogether disinterested, and not connected with the

(a) Mr. Boughner had been employed in 1871, as right of way agent of the Canada Southern Railway Company, under Mr. Tracey, and was present when the purchase from the plaintiff was effected.—RER.

parties, and I think it should weigh as much as Tracey's evidence ; and that is in confirmation of the plaintiff's evidence. It is a difficult question, however, whether an agreement of that kind could be performed ; that is, whether Tracey had authority to enter into an agreement of that kind. I am inclined to think he had not ; that there was no authority in the nature of his power for purchasing the right of way that would justify him into entering into such an agreement ; but the case does not rest upon that here ; it is not the case of a person coming asking for specific performance of an agreement. The agreement here, I think, has been completed. I do not think that the plaintiff needs to show that Tracey had authority ; all he needs to show is, that Tracey did make the agreement.

The company must act by its hands, and its hands are the agents of the company, and they have recognized this agreement ; they have left the way in the railway for the use of the plaintiff, and have left the fences to correspond with that so as to leave no obstruction for the plaintiff in the use of the crossing, and they have allowed these to be used in that way for some eleven years. It is quite impossible to suppose that the company could be allowed to say that it was ignorant of this arrangement with the plaintiff. I think that the whole evidence shows conclusively that the company must be taken to have known of the agreement that was entered into with the plaintiff, and that they approved of it, and gave effect to it, until latterly they seek to put an end to it for the purpose of the roadway.

Then it is said that this crossing, supposing it to be an arrangement by which the company were bound, is not necessarily a permanent one. I think that is entirely inconsistent with the opinions of our Courts. Where a farm is divided by the passage of a railway, a crossing is a necessity, and I think that the very nature of the thing requires that it should be as permanent as the land itself, and I cannot see that there is any distinction to be made between a crossing on a level and a crossing under the railway ; they seem to me to rest upon the same ground—that they are for

the permanent use of the owners of the property, and it is sworn here that the obtaining of them was part consideration for the granting of the land.

I think it is just a case in which the plaintiff ought to be entitled to the relief he asks, damages for the obstruction, and an order restraining these acts of trespass for the future.

I will have to look at that case of *Jessup v. Grand Trunk R. W. Co.*, 7 App. 128. In the meantime all the case is disposed of so far as I am concerned, unless I find that *Jessup's Case* compels me to decide otherwise.

Subsequently on November 26th, 1882, his Lordship delivered the following supplemental judgment:

PROUDFOOT, J.—In this action, which was brought to prevent the defendants from obstructing a farm crossing under the railroad, I found the facts at the hearing in favour of the plaintiff, and considered him entitled to a judgment; but at the request of the defendants' counsel deferred judgment till I had an opportunity of referring to the cases of *Jessup v. Grand Trunk R. W. Co.*, 7 App. 128, and *Schliehauf and Oxford v. Canada Southern R. W. Co.*, 28 Gr. 236.

Both these cases refer to the location of stations and their permanent maintenance at the spot pointed out. Now there is an obvious difference between a station and a farm crossing in respect to their continuance and maintenance. In regard to the former, any advantage to the land owner must depend upon agreement with the company; if he wishes to secure their continuous existence on one spot he must have an agreement to that effect, for a station is principally for the benefit of the railway, liable to be removed according as the exigencies of the traffic and travel may require, and is in its nature temporary. No statute imposes any liability to maintain them, and, in the absence of agreement, it is optional with the company to allow them to go to ruin.

Southern Arrangement Act of 1878 (b), new interests have arisen and, been registered, which take precedence of the plaintiff's unregistered equity, and gives to the mortgagees under that arrangement the power of making all repairs and replacements and such useful alterations, additions, and improvements to the road as may seem to them judicious.

I do not think this gave any power to destroy a farm crossing given in consideration of the land, nor authorized the mortgagees to interfere with rights the railway company were liable to respect: that the plaintiff's right was not a mere equity, but a legal and open right of which he was in the actual and acknowledged enjoyment when the mortgage was made; that it was never intended to give the mortgagees larger powers than the railway company possessed, or to set them free from the liabilities incident to the existence of the railway itself.

The counsel for the defendants has also favoured me with a reference to other and more recent cases, for the purpose of showing that an agreement to maintain a crossing does not run with the land; that it is personal, even where the covenant was "for himself, his heirs and assigns." *The London and South Western R. W. Co. v. Gomm*, L. R. 20 Ch. D. 562, and *Haywood v. Brunswick Permanent Benefit Building Society*, L. R. 8 Q. B. D. 403. In the former case the railway company were seeking to enforce an agreement against a purchaser from the heir of the covenantor, which was held not to run with the land. And in the latter, it was held that where land was granted in fee in consideration of a rent charge and a covenant to build and repair buildings, the assignee of the grantee of the land was not liable on the ground of notice to the assignee of the grantee of the rent charge on the covenant to repair. I do not think either of them applicable, because the parties who entered into the agreement and the owners of the property affected by it are in this case the same, no change having occurred in the ownership, and relief not being

sought against an assignee or transferee ; and also because, as I have said before, it required no agreement on the part of the defendants to render them liable to maintain the crossing. That was a duty imposed upon them by the statute giving them compulsory powers,

At the hearing I expressed myself doubtful, from the recollection of some recent cases, of the authority of agents for the purchase of the right of way to make crossings, and agree as to what crossings should be given. I do not entertain that doubt now, at least to the same extent. It seems to me to be a power naturally incident to the appointment. The railway could not be constructed without making provision for these crossings, and the purchase of the right of way would be impracticable if in each of many hundred cases reference had to be made to the president and directors of the company for their approval.

This is altogether different from arrangements in regard to stations such as I have mentioned, or where the consideration given for the right of way, was some special, collateral indefinite advantage, such as in *Bettridge v. The Great Western R. W. Co.* 3 E. & A. 58.

I think the defendants must be enjoined from interfering with the plaintiff's crossing, and the decree will be with costs.

A. H. F. L.

[CHANCERY DIVISION.]

FOLEY v. CANADA PERMANENT LOAN AND SAVINGS CO.

Mortgage by infant—Confirmation of voidable instrument—Acquiescence—Laches—Presumption of knowledge of legal rights

The plaintiff being at the time an infant, on February 20th, 1878, executed a mortgage in favour of the defendants. The proceeds were chiefly applied in paying off prior incumbrances on the land. The plaintiff came of age on April 19th, 1880. After this date, and with full knowledge of his position, he, on January 10th, 1884, executed another mortgage, with the object of in part paying off the mortgage in question; and, moreover, by certain conversation with an agent of the defendants, he admitted his liability under the latter mortgage, nor did he take any steps to disaffirm it until September 7th, 1882. On September 30th, 1882, this action was commenced.

Held, that the mortgage in question was not void, but only voidable, and that the plaintiff's conduct after he came of age, amounted to a ratification of it.

The rule is now well established, that the deed of an infant is not void *ab initio*, but voidable, on his attaining majority. If he wishes to avoid it, he must expressly repudiate his contract within a reasonable time after coming of age, otherwise his silence will be held to amount to an affirmation of it.

Semble, that acts of less moment and significance than are required to avoid the conveyance of a minor, may be sufficient to affirm it.

Semble, [*per* Proudford, J.,] that it must be presumed that an adult who affirms a deed executed by him in infancy, does so with knowledge of his rights, and of his exemption from liability.

Per BOYD, C. The policy of the law now is generally to allow the infant to suspend his ultimate decision upon questions of benefit or injury, till he is of legal capacity to bind himself as an adult. When he arrives at majority he is clothed with full legal capacity with all its incidents, and, as an adult, has no special protection on the ground of ignorance of the law, and any disaffirmance by him of a deed executed during minority, should only be given effect to on the terms of his restoring to the other party, as far as possible, any benefit obtained by him during minority.

THIS was an action brought by one Patrick Foley against the Canada Permanent Loan and Savings Company to obtain the release and cancellation of certain mortgages. The action was commenced on September 30, 1882. By his statement of claim the plaintiff alleged that his father, Richard Foley, sen., died on December 15th, 1873, when he, the plaintiff was under fourteen years of age, leaving a will, wherein, after appointing certain persons therein named to be his executors, he proceeded as

follows: "I bequeath to my son Richard the west half of Lot 3, Con. 11 of Township of Brant, to come into his possession as soon as he pays the sum of \$100 to my daughter Mary, and the sum of \$50 to my son James. I request that my executors sell the east half of Lot 4, Con. 11 of Township of Brant, and that out of the proceeds of such sale they pay the amount due to the Crown upon the west half of said Lot 4, and take out the Crown patent for the west half of said lot in the name of my wife Mary Foley. That my executors pay whatever money remains after paying the amount due on the said west half of Lot 4 to my wife Mary Foley. That my wife pay the balance of the mortgage due, or to become due, on Lot 3 Con. 11, of said Township of Brant. And for the payment of my said mortgage I give and devise to my wife, to her sole use and benefit while she lives and remains unmarried, the east half of Lot 3 and the west half of Lot 4, in Con. 11, of the said Township of Brant." Then followed certain legacies of trifling amount, after which the will continued as follows: "I bequeath to my son Patrick the east half of Lot 3, and west half of Lot 4, Con. 11, of the said Township of Brant, to come into his possession on the death or marriage of my wife Mary Foley. I bequeath to my daughter Ellen the sum of \$100, to be paid to her by my son Patrick within three years after he comes into possession of the above-mentioned property."

The plaintiff then went on to allege that at his death Richard Foley, sen., owned in fee said Lot 3, Con. 11, of the Township of Brant, subject to two mortgages granted by him thereon. And he also owned Lot 4 in said concession subject to the payment of the balance of purchase money due to the Crown, and was entitled to a patent from the Crown for the same on payment of such balance; that his executors conveyed the east half of Lot 4 to Mary Foley, the testator's widow, in consideration of her agreeing to pay off the said encumbrances and the balance of purchase money due the Crown as provided in the said will, and the said Mary Foley procured a patent to be issued of the east half of

lot 4, to herself, her heirs and assigns for ever, and also procured a patent to be issued of said west half of lot 4, to have and to hold the same unto the said Mary Foley during her life, or so long as she remained unmarried, remainder to the plaintiff his heirs and assigns forever, subject to the charges expressed in the said will: that Mary Foley did not marry again but died on September 8th, 1882: that on March 16th, 1881, he, the plaintiff, attained twenty-one years of age: that after Mary Foley's death he discovered for the first time that there were two mortgages registered in the registry office for the county of Bruce against the land devised to him as aforesaid, purporting to have been made by Mary Foley and himself to the defendants, the first being dated October 9th, 1876, on the east half of lot 3, and the west half of lot 4, to secure payment of \$1,000 and interest, and registered on October 16th, 1876, and the second dated February 20th, 1878, on the east half of said lot 3 and the whole of said lot 4, to secure payment of \$1,300 and interest, and registered on March 2nd, 1878: that he had examined the duplicates of the said mortgages as registered, and that the same were executed by him, but that he had no knowledge or recollection of executing the said first mentioned mortgage: that he executed the second mortgage at the request of his elder brother, the said Richard Foley, jun., who represented to him that he was simply releasing to the said Richard Foley his interest in the west half of lot 3 devised to the said Richard Foley as aforesaid, and the plaintiff was totally unaware that the said indenture was a mortgage or any deed affecting the land devised to him as aforesaid: that he, the plaintiff, was under twenty-one years of age when he executed both the said mortgages, and had no advice or assistance, and was ignorant of his rights in the premises: that the defendants never advanced any money whatever as consideration for the first mortgage, but the same was without consideration: that he, the plaintiff, received no benefit from the second mortgage or from the money secured thereby: that as soon as he was

properly advised of the said mortgages and of his rights he repudiated them, and notified the defendants to that effect: that the registration of the said mortgages formed a cloud on his title, but the defendants had refused to execute releases when tendered, and were threatening to alienate the said lands; and the plaintiff prayed that the defendants might be ordered to execute such releases as might be necessary to remove the cloud on his, the plaintiff's, title caused by such mortgages, and deliver them up to be cancelled.

By their statement of defence the defendants said the plaintiff was of the full age of twenty-one years when he executed the said mortgage of February 20th, 1878; but if not, yet previously to and at the time of the execution of the said mortgage the plaintiff, well knowing that the defendants relied on his statement, represented to them that he was of full age, and they advanced the consideration of the said mortgage on the faith of such representations, and would not otherwise have done so: that since the date of the alleged coming of age of the plaintiff he acquiesced in and confirmed the said mortgage: that the said mortgage of February 20th, 1878, contained a covenant to the effect that in the event of the money thereby advanced, or any part thereof being applied to the payment of any charge or incumbrance, the mortgagees should stand in the position and be entitled to all the equities of the person or persons so paid off; the proceeds of the said advance were applied in paying off the amount due the Crown, and two mortgages made by the said Richard Foley, sen., mentioned in the statement of claim, on the lands in question herein with other lands, and the defendants submitted they were entitled to a lien on the said lands to the extent of the charges so paid off; that the said mortgage included lands owned by the plaintiff's co-mortgagor Mary Foley, other than those in question herein: that they claimed no interest under the mortgage of October 9th, 1876, and on November 13th, 1877, they executed a discharge thereof, and delivered it to the plaintiff and his co-mortgagor, but

the said mortgage and discharge were with the other title deeds returned to them, the defendants, when the mortgage of February 20th, 1878, was made, and that they had always been and were willing to deliver up the said mortgage of October 9th, 1876, and discharge.

The action was tried at the sittings of this Court, at Walkerton, on November 7th, 1882, before Boyd, C.

The plaintiff on his examination, which was put in evidence said: "I am not aware that my mother got a loan from the defendants in 1878. I was living with my mother on the property in question in 1876. * * I knew I had an interest in the east half three and west half four, under my father's will. * * I only (*sic*) remember my age at my father's death, except from what I have since been told. I was told I was then fourteen years. * * I was living with my mother in 1876. * * I acknowledge signature to mortgage of October, 1876, to be mine. I do not remember the circumstances of the signing the mortgage of 1876. * * I did not know I was signing a mortgage. I thought I was signing off my claim to west-half lot three to Richard Foley. Richard told me that at the time. * * I did not think it strange. * * I remember signing a paper, but what it was I do not know * * The signatures to mortgage of February, 1878, are mine. I remember signing a mortgage in my own house about that time. My two sisters Julia and Nellie were present. I knew it was a mortgage, the \$700 mortgage (a.) * * I signed it because mother wanted the money. I suppose I was about twenty at that time. I knew I was signing away my interest in the property, and I was willing. Mother told me there was \$1,300 on the place, and she wanted to pay it off. Mother and I lived on good terms. She did get me to sign a paper I did not know about (the first mortgage.) * * When I signed the \$700 was the first time I knew there was a mortgage

(a) This was a mortgage to the London and Ontario Investment Company for \$700, executed by the plaintiff on January 10th, 1881.

against the place. A part of the \$700 was read over to me, the amount and the property. * * I never asked her what was going to be done about the \$1,300 mortgage. I remember being served by (*sic*) a notice of sale by Mr. Hay. He explained to him (*sic*) what it was. I thought it was the company who had the \$1,300 mortgage. I was served on the road, about four miles from property, at Ellengowan. He came out of tavern. I told him I did not know what to do with it. I did not tell him I would pay it. I said I would like, if I saw a way of paying it: that I would try and do it. I knew the company had threatened to take proceedings before I made the claim. It was in consequence of the threatened proceedings that I came to see my solicitor. I did not know whether I was liable to pay or not. I thought I might be liable to pay on account of the mortgage I signed. It occurred to me that I was an infant when mortgage signed, but it did not occur to me when I signed mortgage. * * I know now that I was under age when I signed mortgages. I did not know my own age when papers signed. I learned my age about two months ago. I got some information before. I can't say for sure whether I knew I was not of age when I saw my solicitors. * * I had some information before then. It was after my mother's death. I learned from neighbours; not from any member of my family. * * I cannot say for sure the date of my birth. I believe I came of age in March, 1881. I believe I came to know something of my having signed a mortgage for \$1,300 about that time. This is the first mortgage. I did not know the effect of it then. This was the mortgage Richard got me to sign. * * I said nothing when I learned I signed first mortgage. It was from my mother I learned it, and I signed the \$700 mortgage after learning that fact. I was not willing that the \$1,300 mortgage should be charged against me. * * When I went to see my solicitors I thought I might be liable on the \$1,300 mortgage I signed. * * I have no recollection of signing more than two papers. * * The mortgage to the

London & Ontario Company for \$700, is the second one I refer to. The signature to it is mine. When I signed the second mortgage my mother told me there was a \$1,300 mortgage on the property. I did not know then that I had signed it. I first learned of the mortgage for \$1,300 was signed by me about a year ago. * * The service of the notice by Hay was the first I ever learned that the company threatened to take proceedings."

Nellie Foley, sister of the plaintiff, gave evidence as follows :

Q. You remember Patrick speaking of a mortgage ?

A. Yes, I remember about him speaking of a mortgage; that was just between ourselves, mother and me in the house. I do not remember what he said (b).

Mr. Hay, who was a valuator of the defendants' company, gave evidence as follows :

Q. Do you remember serving the plaintiff with a paper for the company a short time ago ? A. Yes. Q. What time was that ? A. It was in September I think about the 23rd of September, last. Q. Where did you serve him ?

A. I served him at Ellengowan. Q. What was the paper ?

A. It was a notice about the arrears on his mortgage, the closing of his mortgage. Q. That is the one in question ?

A. Yes. Q. Notice of sale or intention to sell ? A. Yes.

Q. When you served him what did he say ? A. Well, he said that he did not know what he would do about it, that

he was not able to pay. A. Did he repudiate the mortgage at all to you ? A. After he walked a while he said that

it was too bad, that he was not of age when that was signed ; well, I said to him something like the company

could not help it, or something, " Well," he said, " it was right that the company should be paid." Q. So when

speaking to you he knew that he was not of age when he signed the mortgage ? A. Yes.

The remainder of the facts of the case, and the evidence adduced, sufficiently appears in the judgment of Boyd, C.

(b) The conversation spoken of here was alleged to have taken place some five years before the commencement of this action. REP.

David Robertson, for the plaintiff, cited *Fisher v. Mowbray*, 8 East 330; *Keane v. Boycott*, 2 H. Bl. 511; *Grace v. Whitehead*, 7 Gr. 591; *Baylis v. Dinely*, 3 M. & S. 477; *Regian v. Lord*, 12 Q. B. 757; *Martin v. Gale*, L. R. 4 Ch. D. 428; *Rowe v. Hopwood*, L. R. 4 Q. B. 1; *McCord v. Osborne*, L. R. 1 C. P. D. 568; *Rawley v. Rawley*, L. R. 1 Q. B. D. 460; *Watson v. Dowser*, 28 Gr. 478; *Simpson's Law of Infants*, p. 13; R. S. O., c. 117.

Z. Lash, Q. C., and *Leonard*, for the defendants, cited *Featherston v. McDonell*, 15 C. P. 162; *Dolphin v. Aylward*, L. R. 4 H. L. 486; *McIntyre v. Shaw*, 12 Gr. 295; *Mills v. Davis*, 9 C. P. 510; *Gilchrist v. Ramsay*, 27 U. C. R. 500; *Leary v. Rose*, 10 Gr. 346; *Re Shaver*, 3 Ch. Ch. 379; *Clark v. Copley*, 2 Cox 173; *Pollock on Contracts*, 3rd ed., 55-63; *Dart on Vendors and Purchasers*, 5th ed., p. 26.

November 22nd, 1882. BOYD, C.—I am very decidedly of opinion that the plaintiff's contention, that the mortgage was and is void cannot be sustained. The rule of English law was laid down of old time, by *Perkins*, (on Conveyancing, 15th ed., sec. 12), that deeds of infants which take effect by delivery are only voidable not void. This was recognized as the correct rule by Lord Mansfield in *Zouch v. Parsons*, 3 Burr. 1804, followed by Lord Eldon in — *v. Hancock*, 17 Ves. 383, and approved of by Lord St. Leonards in *Allen v. Allen*, 2 Dr. & War. 338. So also held in this country in *Mills v. Davis*, 9 C. P. 510; *Featherston v. McDonell*, 15 C. P. 162, and *McCoppin v. McGuire*, 34 U. C. R. 157.

It was urged that this infant could only be regarded as a surety for his mother in jointly executing with her the mortgage in question, and that such an engagement must be of necessity prejudicial to the infant, and therefore void *ab initio*. I am not sure that this is a correct test to apply in modern law, assuming the contention to be well-founded. The better view is as given by Lord St. Leonards: "If an infant has executed a deed which proves to be injurious to his interests it is voidable. He may set it aside when he attains his full age:" *Allen v. Allen*, 2 Dr. & War.

The mortgage is valid till he does some act to repudiate it; and the next question is, has he confirmed it or repudiated it? The dates become important. According to the plaintiff's statement of claim, he came of age on March 16th, 1881. On September 7th, 1882, his solicitors write to the defendants, demanding a release of the east half of lot 3 and west half of lot 4 from the operation of the mortgage, (though it would appear that he did not see them personally at that time); and on the 30th of that month this action is begun, claiming the same relief. But the evidence of the plaintiff's own witnesses establishes that he was born on April 19th, 1859, and so would be of age in April, 1880, eleven months earlier than his pleading admits. The first act towards disaffirmance is the letter of September 7th, which coupled with the issue of the writ would be of sufficient solemnity to annul the mortgage, if he had not previously ratified it. The defendants rely upon the lapse of time, from April 19th, 1880, to September 7th, 1882; and also upon the action of the plaintiff in executing a mortgage on this and other land to the London and Ontario Investment Company for \$700, in order to pay off part of the defendants' mortgage. This was on January 10th, 1881, and it appears to have been registered, but no money was advanced thereon, and it has since been discharged. He was at that time told by his mother that he had signed the \$1,300 mortgage, and he was then of age. His sister also in her evidence refers to a conversation some five years ago, in which he and his mother were speaking of a mortgage. The defendants also rely upon what occurred in a conversation with Mr. Hay, their valuator, who served a notice of sale under the mortgage on the plaintiff, on September 23rd, 1882. The plaintiff said, when served, that he did not know what he would do, that he was not able to pay. He said afterwards, that it was too bad, that he was not of age when the mortgage was signed. Hay said the company could not help that, and his reply was, it was right the company should be paid. In the plaintiff's ex-

amination he admits saying to Hay that he would like to pay it if he saw a way to pay it, and that he would try to do it. He thinks this was before he set up his present claim. He also says, "I thought I might be liable to pay on account of the mortgage I had signed. It did occur to me before I signed the mortgage that I was an infant." To obviate the effect of this conduct the plaintiff's counsel urged that the plaintiff was not aware of his age, or of his interest under the will till the last two months. But I find from his examination (which is in evidence) that he knew in 1876 that he had an interest in the lands in dispute, under his father's will; and his ignorance of his own age (if it be the fact) cannot help him much, as he admits that he was told he was fourteen at his father's death, which would make him of age in December, 1880, and he would still be inactive for a period of one year and eight months on his own shewing, although in truth there was acquiescence for eight months longer. The plaintiff's own admissions establish that he knew of signing the mortgage in question, of his being then an infant, of his rights under his father's will, and of his being of age; all these details he knew when he signed the \$700 mortgage in January, 1881. The effect of his signing that was a recognition of his liability on the defendants' mortgage: *Davies v. Davies*, L. R. 9, Eq. 468; as were also his conversation with and his admissions to Mr. Hay. He said in substance that he would pay it if he was able. His ability consists in the fact that he is the owner of the land out of which it can be paid.

It would be unfair to allow the plaintiff to escape on the pretence that he was not aware of his privilege to avoid the obligation when he thus promised. It must be taken that on arriving at age he was clothed with full legal capacity, with all its incidents, and as an adult he has no special protection on the ground of being ignorant of the law. In *Stevens v. Lynch*, 12 East 38, an adult endeavoured to get rid of a promise to pay a note on which he was discharged, because it was made when

he was under a mistaken belief that he was still liable. But the Court held that the defendant had made the promise with a full knowledge of all the circumstances, and could not defend himself because of his ignorance of the law when he made the promise. In the old anonymous case, in 4 Leon. 4, an infant had made a lease for years, and having at full age said to the lessee, "God give you joy of it," it was holden by Meade, J., a good confirmation of the lease, because of that being a usual compliment to express assent and approbation of what is done.

The company was misled as to the plaintiff's age by the statements and certificates of his mother and brothers, and supposed him to be of full age before the mortgage was signed. He knowing the contrary, in January, 1881, remains inactive, and thereby prejudices the defendants in two ways: First, the interest is accruing due and lessening the company's security upon the lands; and, secondly, the death of the mother before he seeks to repudiate, deprives the company of their right to sell her estate in the two pieces of land which the plaintiff claims. Now it is reasonable that acts of much less moment and significance than are required to avoid the conveyance of a minor will be sufficient evidence of its ratification. Because by the voidable instrument the estate passes at the time of its execution, and the subsequent assent of the infant does not impart anything to it which it had not before. The ratification is just the consent of the person when of full age "Expressing to the effect, that he is willing to affirm the deed, and treat it as valid." (See per *Martin, B.*, in *Mawson v. Blane*, 10 Ex. 212. This assent however expressed, whether by word or act, by action or inaction, takes from the contract its quality of voidableness; and in the present case I find evidence of assent both by speech and conduct prior to the bringing of this action, which disentitles him to claim the privilege of disaffirmance.

After a somewhat careful search into the authorities, I think the law is correctly and concisely stated in Simpson's

Law of Infants, page 71. His conclusion is: "In cases where an act has actually been performed, as where a conveyance passing an estate has been executed by an infant, or in cases of continuing contract or representation, as when he holds himself out as a partner, he must do some distinct act in avoidance at or soon after twenty-one, or he will be held bound by acquiescence."

Many cases may be cited in which much less delay than is found here has precluded the party from getting relief. Here the time of inaction is two years and five months. Thus in *Mitchell's Case*, L. R. 9 Eq. 363, the delay was two years; in *Ebbett's Case*, L. R. 5 Ch. 302, fourteen months; in *Doe dem. Bromfield v. Smith*, 2 T. R. 436, one year; in *Lumsden's Case*, L. R. 4 Ch. 31, six months; in *Holmes v. Blogg*, 8 Taunt, 35, S. C. 1 Moo. 466, four months; and in *Ashton v. McDougall* 5 Bea. 56, less than two months. All these were cases where it was held that the infant affirmed by implication, because of not disaffirming within a reasonable time. Richards, C. J., in *Featherston v. McDonell*, 15 C. P. 166, thought the limit of four months, referred to in the case in 8 Taunt, might well apply as a time limit of general application in cases of infancy.

Had I not come to the conclusion that the plaintiff entirely fails, I should unquestionably have given the defendants liens upon the land for the money in the nature of salvage paid by them to the Crown and the prior mortgagees. It would be grossly inequitable to give effect to the infant's disaffirmance unless upon the terms of requiring him to restore to the other party, as far as possible, what of benefit he obtained during infancy. A late case in New York on all fours with this (save that the disaffirmation was held in time), puts the mortgagees' claim to equitable subrogation in a very clear and satisfactory light: *Snelling v. McIntyre*, 6 Abb. New C. 469 (1879).

But for the reasons already given I think that the plaintiff's action should be dismissed, with costs; no cross-relief being claimed.

The plaintiff moved by way of appeal to the Divisional Court, and the motion was argued on February 23rd, 1883, before Boyd, C., Proudfoot, J., and Ferguson, J.

C. Moss, Q. C., for the motion. The mortgage in question was not necessary for the benefit of the plaintiff in any sense of the word, for if the provisions of the will had been properly complied with, he would have got his land free from all charges. But the executors committed a breach of trust, and paid to the widow what should have been applied on the mortgages on the plaintiff's land. The defendant knew of this breach of trust, and cannot complain. The very highest position the plaintiff occupied when he executed this mortgage, was that of surety for his mother; he was not beneficially interested. But Patrick is not only paying off his own share, but Richard's, if this mortgage is to stand good on Patrick's estate. The plaintiff then having, when an infant, signed a mortgage clearly to his prejudice, the instrument is void. The general rule is, that transactions for an infant's benefit are voidable, those to his prejudice are void. I refer to *Chandler v. McKinney*, 6 Mich. 217. [BOYD, C. The American cases no doubt, if they apply here, prove your case; for they hold an infant has the full term of the Statute of Limitations.] Yes. I refer also to *Tyler on Infancy and Coverture*, Ch. 2—Ch. 4, pp. 42-73, where American authorities are all collected. No doubt they have gone further than the English, but both agree that acts not for the benefit of the infant must be held to be void, not merely voidable. No doubt as to deeds, where it has been carried into effect by the entry of the grantee, the estate passes: *Zouch v. Parsons*, 3 Burr. 1804. But the distinction is between cases where possession is taken under the deed, and where there has been no possession. If the grantee goes into possession to hold the deed void would be to make him a trespasser, which would be obviously unjust. But here the plaintiff never had possession, and the mortgage was an instrument which could never take effect for his benefit in any sense. In *Grace v.*

Whitehead, 7 Gr. 591, at any rate, an infant's mortgage was held void. [BOYD, C.—That was over-ruled.]

[*W. Cassels*.—By *Gilchrist v. Ramsey*, 27 U. C. R. 500.]

Moss, Q. C.—*Gilchrist v. Ramsey*, cannot be said to over-rule *Grace v. Whitehead*; it is distinguishable. I also refer to *Overton v. Banister*, 3 Ha. 503; *Simpson's Law of Infants*, p. 8. But even if the mortgage was only voidable the plaintiff did avoid it, Commencing this action would alone have been a sufficient disaffirmance; but on September 7th, 1882, the solicitor of the plaintiff wrote to the defendants' solicitors asking them to deliver up the mortgage. These facts alone would throw the onus on the defendants to prove ratification. The acquiescence in order to bind must be with a knowledge of all the facts, and of the protection the law affords to the infant. Acquiescence implies knowledge. [FERGUSON, J.—Would proof of knowledge of the law be required after twenty-one? Is knowledge of the law imputed when he knows all the facts?] The Courts have modified the doctrine of imputing knowledge of law. The distinction is taken between knowledge of the general law, and knowledge of the particular rights of the parties. The general rule in regard to this is to be found in *Simpson on Infants*, p. 65. Then there are the cases of *Harris v. Wall*, 1 Ex. 122; *Rowe v. Hopwood*, L. R. 4 Q. B. 1. It must be shewn that an infant is fully aware of all his rights, before you can fix him with acquiescence and ratification. *Rowe v. Hopwood*, *supra*, shews there was no acknowledgment or ratification here. The conversation with Mr. Hay, in September, 1882, could not be held a ratification, after the preceding solemn act of disaffirmance. See *Baylis v. Dineley*, 3 M. & S. 476, as to the proof necessary to bind an infant. Then time could not operate against the plaintiff until he came of age. Acquiescence could not possibly be held to arise until then. [BOYD, C.—But if he had acknowledged the proceeding when under age, a much shorter delay in disaffirming after age would suffice to bar him.] But delay in order to be counted against the party must be such delay as operates in

some prejudicial manner against the party affected. Here the company were not injured at all: *Downes v. Jennings*, 32 Beav. 290. I may refer, also, as to this to a large class of cases in which infants have been sought to be made contributories to companies: *Re Alexandra Park Co.*, *Hart's Case*, L. R. 6 Eq. 572; *Re Commercial Bank Corporation of India and the East*, *Wilson's Case*, L. R. 8 Eq. 240; *Re Mexican and South American Co.*, *Sewell's Case*, L. R. 2 Ch. 387; *Re Contract Corporation*, *Baker's Case*, L. R. 7 Ch. 115; *Re The Financial Corporation*, *Sassoon's Case*, 20 L. T. N. S. 161, *S. C.* in App. *ib.* p. 424; *Re Barned's Bunking Co.*, *Delmar's Case*, 17 W. R. 21. These all shew the delay must be to the prejudice of the other parties, or it does not count. The delay here did no harm to anyone. [BOYD, C.—Then no matter the length of delay, if it be merely delay, and there is no harm done, and no act of affirmance, it does not count. This is no doubt the effect of the American cases; but not, I think, of the English.]

W. Cassels, for the company. The maintenance of the infant after the mother's death must be taken into consideration. Then it is not true to say Richard's share was charged by the will. The plaintiff admits his signature to the mortgage, at the date of which he was nineteen years old, though he denies any recollection of it. Surely under these circumstances the Court must assume he did know of it. The evidence shews the mother and brother acted as agents for the plaintiff in getting this loan. The Court will not allow an infant to disaffirm so as to commit a fraud: *Re Shaver* 3 Ch. R. 379; *Leary v. Rose*, 10 Gr. 346. Here the plaintiff executed the mortgage, in which he covenanted that he had a right to convey. I contend the plaintiff here was bound by the representations of his agents, his mother and brother. In *Grace v. Whitehead*, 7 Gr. 531, the question was not up at all. This case is discussed in *Featherston v. McDonell*, 15 C.P. 168. The law is, the mortgage is operative from the start, but liable to be disaffirmed within a limited time. In one case

in England four months is laid down as the proper limit : *Holmes v. Blogg*, 8 Taunt. 35; and so in America, the same limit is adopted : *Kline v. Beebe*, 6 Conn. 494. The law is laid down in *Gilchrist v. Ramsay*, 27 U. C. R. 500 ; *Kent's Com.* 12th ed. vol. 2, p. 289 ; *Ewell's Leading Cases*, p. 13 ; *Kline v. Beebe*, 6 Conn. 494. In a case where whether a proceeding becomes operative or inoperative depends on affirmance, it may require a long period to imply ratification ; but it is otherwise when the instrument is *ab initio* operative. Then there is the case of *The Eagle Fire Co. v. Lent*, 1 Edw. Ch. (N.Y.) 301, which has an important bearing on this case. *Merchants' Fire Ins. Co. v. Grant*, 2 Edw. (Chy.) 544, and *Palmer v. Miller*, 25 Barb. (N. Y.) 399 shew that in the States as well as in England and here the mortgage is operative till disaffirmed. Here the infant should have come forward and offered to put us back in the position we were in before ; he should have come forward and repaid our money ; to keep the money amounts to affirmation. I refer also to *Davies v. Davies*, L. R. 9 Eq. 468 ; *Re Blakely Ordnance Co.*, *Lumsden's Case*, L. R. 4 Ch. 31 ; *Re Constantinople and Alexandria Hotel Co.*, *Ebbett's Case*, L. R. 5 Ch. 302. As regards the evidence, the position is, that when the plaintiff executed the second mortgage he knew of the first mortgage, and he knew he was executing with the view of paying off the first mortgage. Ratification is, that the infant has done something which shews he intended to affirm, and does not need communication. We were injured by the plaintiff's delay and laches. Our remedy against the mother and brother for a fraud, if it is a fraud, is gone after their death. I submit the judgment is clearly right. It turns really on one point, viz. : whether the mortgage was void or only voidable. I may refer also to *White v. Cox*, L. R. 2 Ch. D. 387 ; *Re Norwegian Charcoal Iron Co.*, *Mitchell's Case*, L. R. 9 Eq. 363.

Leonard, on same side. Many distinctions have been taken about infant's contracts, amongst them the one we depend on, viz. : that deeds are voidable and not void.

The tendency of modern decisions is, to hold contracts of infants voidable and not void. *Pollock on Cont.*, 3rd Ed. p. 55, 61, collects the cases. Besides the cases referred to by my learned leader, I refer to *North Western R. W. Co. v. McMichael*, 5 Ex. 114, and cases there cited, shewing that acquiescence may amount to ratification in such cases as this, even though the contract be not for the infant's benefit. In any case we would be entitled to a lien for the amount we advanced in paying off mortgages.

C. Moss, Q. C., in reply. The will is not as counsel for the defendants represent it. On this will the wife had the fund in her hands impressed with the trust to pay off these mortgages. Patrick was nearly 15 years of age at his father's death, old enough to work on the farm, as the evidence shews he did. The covenant in the mortgage cannot be said to be a representation as contended. It is extending the doctrine of representation further than it has ever been carried. There must be direct representation by the infant in answer to some question put to him. This question was discussed in *Re Jones*, L. R. 18 Ch. Div. 109. Here there was no communication between these parties in this matter. None of the money paid by the company was paid to the plaintiff. It was paid to the mother, *Mary Foley*. The plaintiff is ignored by the company. It is absurd to say his mother and brother were his agents. The Company advanced the money which they say they applied for the benefit of the plaintiff, with full knowledge that the directions of the will were being departed from, and for the benefit of the widow. The doctrine of salvage depends on persons being compelled in good faith to pay off charges which would otherwise have been enforced upon the plaintiff. The case of *Watson v. Dowser*, 28 Gr. 478, and *Imperial Loan and Investment Co. v. O'Sullivan*, 8 P. R. 162, shew that where a party assumes a position such as the company did here, he cannot claim to stand in the position of the party whom he has paid off.

June 11th, 1883. PROUDFOOT, J.—I think the rule may now be considered as well established that the deed of an infant is not void, but voidable, on his attaining his majority, if it prove to be injurious to his interest. When sued upon a deed made during infancy the defendant cannot plead *non est factum*, he must specially plead his infancy. The rule was different in regard to married women under the former law, her deed was void, and she pleaded *non est factum*.

Being voidable he might disaffirm or confirm it on attaining majority. How this is to be proved, and within what time the option may be exercised, have long been subjects of controversy. There may be a distinction between the nature of the acts necessary to avoid an infant's deed, and of those that are sufficient to confirm it; acts insufficient to avoid may amount to an affirmance. In the English cases very slight circumstances have been held sufficient to establish an approval of the deed. Acquiescence or simply lying by without doing anything to show disapproval for an unreasonable time, has been held sufficient confirmation. In some of the American courts simple acquiescence does not seem to be considered enough, until the lapse of as long a time as would bar a claimant under the Statute of Limitations. But in conjunction with other circumstances an equity may arise to establish ratification. As, for instance, lying by four years while improvements were being made on the property: *Drake v. Ramsay*, 5 Ohio 252; *Wallace v. Lewis*, 4 Harr. (Del.) 75; *Irvine v. Irvine*, 9 Wall. 617, 627. While others of these Courts hold that he must avoid his deed, if at all, within a reasonable time after attaining his majority: *Hartman v. Kendall*, 4 Ind. 403; *Kline v. Beebe*, 6 Conn. 494. There would therefore appear to be no common *consensus* of opinion among the American Judges to induce us, were we at liberty to do so, to vary from the rule to be deduced from our own or the English cases, and these establish that the infant is bound expressly to repudiate his contracts within a reasonable time after arriving at majority, and that if he neglect so to

do his silence will amount to an affirmation: *Holmes v. Blogg*, 8 Taunt. 35; *Dublin and Wicklow R. W. Co. v. Black*, 8 Exch. 181, and other cases cited in *Simpson's Law of Infants*, 48; *Featherston v. McDonell*, 15 U. C. C. P. 162.

The lapse of time in the present case seems to me unreasonable, and that the defendant must be taken to have ratified his deed.

But there was not only the tacit ratification from acquiescence, but the evidence seems also to have established an express acknowledgment of liability after attaining majority, and an opinion expressed that the plaintiff's claim ought to be paid.

Were it necessary to decide whether the defendants should prove that the plaintiff was aware of his rights and of his exemption from liability, I would be inclined to hold that such knowledge should be presumed: *Tuft v. Sergeant*, 18 Barb. (N. Y.) 320; *Morse v. Wheeler*, 4 Allen (Mass.) 570. But I think the evidence in this case shows that the plaintiff was aware that infancy might be a defence.

The cases Mr. Moss referred to to shew that the delay must be accompanied by injury to the defendants. *Hart's Case*, L. R. 6 Eq. 572; *Wilson's Case*, L. R. 8 Eq. 240; *Shewell's Case*, L. R. 2 Ch. 387; *Baker's Case*, L. R. 7 Ch. 115; *Sassoon's Case*, 20 L. T. N. S. 161, 424; *Delmar's Case*, 17 W. R. 21, seem all to have turned upon the distinction between an infant shareholder and an infant contributory. In the latter case the delay must be accompanied by loss, not in the former.

But here there was a prejudice and injury accrued to the defendants from the delay.

I think the decree should be affirmed.

FERGUSON, J.—I am also of the opinion that the judgment of the Chancellor should be affirmed. I have examined the case upon the evidence and the authorities with all the care and attention that I have been able to bestow upon it, and I am entirely satisfied that the mort-

gage in question made by the plaintiff, while an infant, was voidable only, and not void, and was perfectly good until some act done to repudiate it. It has been laid down, and, so far as I have been able to discover, in accordance with the authorities, that when a conveyance passing an estate has been executed by an infant, he must, in order to repudiate it, do some distinct act in avoidance of it at or soon after he attains twenty-one, or he will be bound by his acquiescence. It is not shewn that the plaintiff here did any such act for a period of between two and three years after he attained majority, when a letter was written by his solicitors and suit brought; and much shorter periods than this have been considered sufficient to bind. But I think the plaintiff, instead of avoiding or seeking to avoid the mortgage, ratified it after he was twenty-one years old, and before he did any act in avoidance of it. When he executed the mortgage for \$700 in January, 1881, he was of full age, and he knew this. He knew that he had signed the mortgage in question when he was a minor, and I think the evidence shews that when he executed the mortgage in January, 1881, he was really cognizant of all the material facts, and the authorities seem to me to shew that his executing this under the circumstances existing and known to him, and with the object of paying in part the mortgage in question, was a recognition of his liability on this mortgage (the one in question). Then his conversation with, and his statements made to Hay were quite the contrary of repudiation and an admission and acknowledgment of liability, I think. These certainly were not less than a statement that he was willing to affirm the deed, and treat it as valid, and this appears to be all that is necessary to ratification. On this subject of ratification I have consulted a great many authorities, and am unable to arrive at any conclusion but the one that I have stated, or to form any opinion but that the judgment should be affirmed.

Judgment affirmed, with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

HYNES ET AL V. FISHER ET AL.

Master and servant—Intimidation of servant—Injunction—Suppression of facts on motion ex parte for injunction—Dissolving injunction on motion to continue.

On a motion to continue an injunction the defendant may bring forward such facts as he might if he were moving to dissolve the injunction, and may shew suppression of facts by the plaintiff as a ground for dissolving it, and may thereupon move to dissolve it.

The plaintiffs individually were members of the Master Plasterers' Association and the defendants individually were members of the Operative Plasterers' Association. The plaintiffs did not by their writ state in what character they sued; but by their affidavits filed professed to represent their association, and joined the defendants as representing the operative association. Some of the defendants by threats, intimidation, and violence, prevented one man, who had contracted to work for one of the plaintiffs, from fulfilling his contract, and induced him to leave Toronto, where he had been hired to work, whereby his master suffered injury to his business.

Held that this entitled the master to an injunction restraining these defendants from so interfering with his servants.

It appeared that previous to the intimidation four workmen had struck work with one W., a member of the plaintiffs' association, because W. had refused to pay one of his workmen the wages demanded for him by them. Thereupon the plaintiffs' association passed a resolution imposing a fine on any of its members who should employ the four striking workmen, and communicated this to the defendants' association. The latter demanded the rescission of the resolution, and notified the plaintiffs' association that in default the workmen would strike. The resolution was not rescinded and the workmen struck. The intimidation complained of by the plaintiffs followed as a consequence.

Held that the defendants, by shewing the fact of the resolution of the plaintiffs' association, which the plaintiffs had not divulged on their motion *ex parte* for the injunction, which they now moved to continue, were entitled to have the injunction dissolved.

Held, also, upon the merits, that the plaintiffs were not entitled to the injunction on account of their resolution.

On the 9th November, 1883, the plaintiffs issued a writ of summons against the defendants. The writ was endorsed stating the plaintiffs' claim to be for \$1,000 damages against the defendants for their intimidation of the servants and workmen of the plaintiffs, and their wrongfully inducing and enticing such servants and workmen to leave the plaintiffs' employ, and for their maliciously procuring the breach of contract between the plaintiffs and their

workmen, by which the plaintiffs suffered great loss and damage; and the plaintiffs asked an injunction restraining the defendants, their workmen or agents, from a further continuance of such unlawful acts. The plaintiffs on the same day upon affidavits applied for the injunction which they claimed. The affidavits of Hynes and Lockwood were filed. The affidavit of Hynes stated as follows:

"I am the President of the Master Plasterers' Association, and the other three plaintiffs are members of it.

"The defendant Jacob Fisher is President of the Operative Plasterers' Union, and the other three defendants are officers or members of the union.

"On the 7th November, on behalf of the Master Plasterers' Association, I engaged one James Moriarty by an agreement hereto annexed. In pursuance of such agreement the said Moriarty proceeded with my co-plaintiff Lockwood to the hotel in the city to get his tools to commence work at once, but he was there and then, as I am informed by my co-plaintiff and believe, by the defendants and their agents prevented from fulfilling the said contract, and intimidated by them, and forced by the defendants and their agents to agree to give up the contract, and he has, I believe, left the city, and has not fulfilled his contract with the plaintiffs, or with the said association whom the plaintiffs represent.

"I believe the defendants by their agents, and the agents of the said union have unlawfully and maliciously enticed away the said Moriarty from the plaintiffs' employment, and that on this as well as on previous occasions they have incited men to leave our employment, and to break their contracts with us, by which we have been put to great loss, and suffered damages thereby.

"The defendants, by their agents, have, I believe, maliciously procured the breach of this and other contracts made with the plaintiffs and with the master plasterers, and the fact is, the defendants are an organized association for the purpose, among other things, of intimidating plasterers from working in the City of Toronto unless at such terms as are agreed upon by the said operative union, even although the plasterers may be willing, and have in fact, as in this case, agreed to work on such terms as were suitable to the plasterers, and agreed upon between them and the plaintiffs.

"The defendants well know, as the fact is, that by intimidating the plasterers, and by preventing them in other ways from fulfilling their contracts with the plaintiffs, the plaintiffs are being injured, and suffer loss and damage thereby, and that by their said acts and by such like acts they intend to injure the plaintiffs, and such injury has in fact resulted to the plaintiffs.

"The defendants threaten and intend, and will, unless restrained by the order of the Court, intimidate and use other unlawful means by which contracts made by the plaintiffs with plasterers, and freely entered into by the said plasterers, will be broken; and the plaintiffs will be unable to carry on business in Toronto or elsewhere in the Province, unless they are protected from the unlawful acts of the defendants and their agents.

"The plaintiffs represent the Master Plasterers' Association of Toronto, and the defendants represent the Operative Plasterers' Union herein, and a committee of the union for what is called the strike committee, of which the defendant Chase is chairman, whose professed object is the preventing of labourers and workmen from accepting work from the plaintiffs, except on terms agreeable to such union and the committee thereof; and the plaintiffs say, and the fact is, that if the defendants are permitted to intimidate and molest the said workmen as they have done, and as they threaten and intend to do, the plaintiffs will be unable to carry on their business as aforesaid."

Lockwood's affidavit was as follows:

"I have read the affidavit of my co-plaintiff Hynes, and I confirm it in every particular.

"I accompanied the said Moriarty to an hotel on York street, in Toronto, in order that he might get his tools and commence his work under the said agreement.

"When we arrived at the hotel a number of men on strike against the master plasterers assembled, and a large number of them, who are members of the defendants' union, took forcible possession of Moriarty, catching hold of him and thrusting their fists in his face, and uttered loud threats against him if he would go to work on the terms offered by the plaintiffs.

"The said members also took forcible possession of Moriarty's tools and wrested them from him, Moriarty telling them all the while that he intended to go to work for the plaintiffs as he had agreed; but they shouted that he should not.

"The said members also seized hold of me and dragged me violently from the said Moriarty, and also with great violence carried him down to the corner of King street and York street, and there put him in a hack and drove off with him.

"Moriarty has never returned, and the defendants' union say they have sent him out of the city, and have prevented him from working for the plaintiffs."

The injunction ordered "that the defendants, their servants, workmen, and agents, be, and they are hereby restrained from hindering or molesting the plaintiffs from hiring and employing workmen, and from intimidating, hindering, or molesting those who are working, or may be prepared and willing to work, for the plaintiffs, until Tuesday next, the 13th of November, when the motion to continue the injunction is, by leave of the said Judge, to be then made."

On the 13th of November the plaintiffs' counsel moved to continue the injunction.

Osler, Q. C., and Fullerton, for the defendants, contended that the plaintiffs had suppressed certain material facts which would have prevented the Court from granting the injunction if they had, as they should have, been communicated to the Court upon the motion for the injunction; that is, that before the members of the operative plasterers' union struck work the master plasterers' association passed a resolution that the members of the master plasterers' association "employing the men who have left Mr. Ward be fined \$25, and if said men are already employed, to be discharged by next Saturday night, and that these men be not employed by any member until a suitable apology is sent to Mr. Ward;" and which resolution was duly communicated by the secretary of the association to the secretary of the union; and it was in consequence of that resolution the workmen struck; and that such conduct on the part of the plaintiffs' association was conduct of the like nature which the plaintiffs' association charged against the defendants' union, and was the act which led to al

the subsequent difficulty which had arisen between the masters and the operatives.

It was also contended that the affidavits did not disclose a sufficient case: that the matters charged were sworn to by Hynes only upon information and belief, and Lockwood confirmed all that Hynes had sworn to to be true; but that was not that Hynes's facts were true, but that it was true it rested only upon information and belief.

Affidavits were then read on behalf of the defendants, stating generally that an agreement had been entered into some time ago between the masters and workmen that the men should be paid at the rate of twenty-five cents per hour for their work: that Ward, a master, had employed Patrick Higgins, a union man, upon the usual terms, and after twenty-nine hours' work paid him only fifteen cents an hour; and that Ward was charged by the men with breaking the agreement between the masters and workmen, and the other four men who were working for Ward gave him notice that if he did not pay the man the twenty-five cents per hour they would leave his employ: that he would not do so, and the four men left his work; and that was the cause of the masters' resolution against these four men. The defendants' union asserted that that resolution was unjust, and should be rescinded by the masters, and, they stated, if it were rescinded the men would all go back to their work.

It was also stated that the term of service under the agreement between the masters and the men was by the hour, so that any man could be discharged at the end of any hour.

Chase, one of the defendants, in his affidavit, said:

"I saw Moriarty come away from Lockwood, and come away with the men. He came of his own accord. I asked him if he was coming with us. He said he was; and he and I then got into a hack and drove to our rooms, and he went out of the city on the same day. Moriarty said to me, he had told me before what he would do, and he had fulfilled it, and I believe Hynes and Lockwood were deceived by Moriarty; and it is untrue he was intimidated

by us or any one on our behalf as represented. All that has been done by us is to represent to workmen what we consider to be an unjust combination made by the masters against four of our members, and if the masters will withdraw their resolution the strike will end at once."

John Porter said he and Chase had a conversation with Moriarty, and they explained to Moriarty the cause of the strike. Moriarty said he would go and see the bosses, and report what they were doing, and Moriarty when he came back said to Chase, "I told you I would not go back on the boys."

Alexander McCord said he saw Moriarty leave Mr. Lockwood :

"I was the person with whom Moriarty came away, and he came of his own free will with us, and was not intimidated in any way, and no violence or threats was or were used to him. I asked Moriarty if he wanted to go with the bosses, and he said he was going with us."

It was denied that Fisher was present at the time Moriarty left.

All acts of violence, threats, or intimidation were denied.

The plaintiffs' counsel asked for an adjournment to consider and, if necessary, to cross-examine the defendants upon their affidavits.

On the 23rd November the argument on the original motion was resumed.

Blake, Q. C., for plaintiffs. There was no suppression of any material fact necessary to be disclosed upon the motion for the *ex parte* injunction. But if there were, the defendants have not made that an objection to the order. If they intended to rely upon an alleged suppression they should have specially given notice of motion to dissolve the injunction for that cause. They cannot discuss that objection upon the present motion of the plaintiffs to continue the injunction. The injunction has been continued, and affidavits upon the merits have been filed by the defendants; the *ex parte* process has answered its purpose.

and now the discussion can be only on the merits, just as if the order had been granted on notice and not *ex parte*. The objection of suppression is always and only can be to an *ex parte* proceeding, and this is no longer a proceeding of that kind: *Ley v. McDonald*, 2 Gr. 398; *McMaster v. Callaway*, 6 Gr. 577; *Fiskin v. Rutherford*, 7 U. C. L. J. 124; *McLaren v. Stainton*, 16 Beav. 279; *Weston v. Arnold*, L. R. 8 Ch. 1084. Upon the merits this is a case in which an injunction may be granted. It will be granted in the case of a libel, where the libel has been found by a jury injurious to the trade of the plaintiff: *Saxby v. Easterbrook*, L. R. 3 C. P. D. 339. See also *Thorley's Cattle Food Co. v. Massam*, L. R. 6 Ch. D. 582, commenting upon *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. 142. So also where it is to restrain one from employing another who has been engaged by the plaintiff, and who is entitled to the exclusive services of that person: *Brown v. Hall*, L. R. 6 Q. B. D. 333. So if officers of a trade union gave notice to workmen not to hire with plaintiffs pending a dispute between the plaintiffs and the union, by means of which the plaintiffs could not continue their business, and their property was injured: *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 557.

Osler, Q. C., and *Fullerton*, contra. The suppression of the resolution of the masters, and of the facts relating to their own conduct in the difference between the masters and the men, is an answer to the injunction upon the merits, and it is contended the injunction may be dissolved on the present motion to continue it, as well as upon a special notice or motion to dissolve it. The cases cited on the other side are all based upon property being affected and injured by the acts complained of; but here property is in no way affected. The parties, if any of them interfered as complained of, cannot make these defendants responsible for their acts, for they were not the agents of the defendants, and the mere fact that these persons and the defendants are members of the same union will not make the defendants answerable for all the acts of the

Other members. Mere association will not constitute agency: *Joyce on Injunctions*, 1034; *Lindley on Part.* 4th ed. 56.

Blake, Q.C., in reply. The passages read from *Joyce on Injunctions* relate to motions expressly to dissolve the injunction, and are not applicable, as before stated, to the case as it now stands: *Fitch v. Rochfort*, 18 L. J. Ch. 458. If all the facts were stated, which it is said should have been stated here, the case would still shew the workmen began the trouble. Some of the union men complained that one of the masters' association would not pay to an unskilful workman the wages of a skilled man; and because the master refused, four other men of the union left their service with the same master, and because they were creating unnecessary difficulty the masters passed the resolution before mentioned. But that resolution is no kind of excuse or justification for the threats, violence, and intimidation of the parties complained of, and cannot be passed over because of the master's resolution. As to agency, it may be said shortly, that the whole purpose of the defendants' union at the present time is to use their powers to obstruct the masters from prosecuting their business, and to carry out that purpose by the means which have been used.

December 4, 1883. WILSON, C. J.—The first point for consideration is, whether the defendants, upon the motion of the plaintiffs to continue the injunction, had the right to shew cause against that motion by shewing suppression by the plaintiffs of material facts, and such other matters as are usually relied upon for dissolving the injunction, and to claim a dissolution of the injunction on such grounds, or whether they were bound to make a specific motion for the dissolution.

The following cases may be referred to on the question:

An injunction granted until further order or answer is not determined by the putting in of the answer, but a special motion must be made to dissolve it: *Ooddeen v. Oakley*, 2 DeG. F. & J. 158.

If the plaintiff gives notice to continue the injunction and the defendant to dissolve it, the plaintiff has the right to begin: *Fraser v. Whalley*, 2 H. & M. 10.

On a motion to dissolve it is irregular to grant a new injunction, and especially so if it be not in the terms of the bill: *Burdett v. Hay*, 2 DeG. J. & S. 41.

In *Novello v. James*, 1 Jur. N. S. 217, on a notice of motion to dissolve, the injunction, apparently without any motion to continue, was continued.

If the motion were to shew cause, the defendant could shew by affidavits, by way of answer, that facts had been suppressed.

On a motion to continue, I think the defendants may bring forward the like facts which they could if they were called upon to shew cause.

On a motion to dissolve, as upon every other notice of motion, the notice should, I think, shew the grounds upon which the motion is proposed to be made; otherwise the opposite party cannot be prepared to answer the motion; but if a motion can be continued on a motion to dissolve, I do not see why the reverse proceeding may not be had.

Each party may give notice, the one to continue and the other to dissolve.

I have consulted one of the leading counsel at the Equity Bar, and he informs me the present learned Chief Justice of Ontario, while Chancellor, decided that a party, on a motion to continue, could shew for cause that it should be dissolved; and the learned Chief Justice, to whom I have spoken on the subject, says he has no remembrance of so deciding; but it is very probable he did so, as he sees no objection to such a practice.

I think I may follow such authority, although there is much force in Mr. Blake's argument, that on a motion to continue the question is upon the merits, and if anything but the merits are to be considered the plaintiffs should have notice of it.

In this case it is not of much consequence whether the cause now shewn is allowed as ground for dissolution, or

as an answer to the merits ; for I think the cause shewn was rather by way of answer on the merits than to the granting of the dissolution upon facts wrongly suppressed, and the costs, which always follow a dissolution for suppression, are in this case disposed of upon special grounds.

The principal matters which were argued were :

1. Were the matters proved against the defendants, or any of them ; and if proved, were they sufficient to support the injunction, assuming the acts complained of were done to the prejudice of the plaintiffs ?
2. Was the injunction rightly granted in law in such a case, assuming the case to have been proved ?
3. Were the facts shewn as cause a sufficient answer against the continuance of the injunction ?

The affidavits filed in support of the original motion shew the plaintiffs represent in fact the Masters' Association of Plasterers, and that one or more of the masters, acting for and on behalf of the association, having hired a man to work for one or other of those who are associated with the masters, was and were, by certain acts charged to have been committed by the defendants, prevented from getting the services of that man, and the man so hired was compelled or induced by the defendants not to hire, as aforesaid ; and that the defendants threaten to continue the like conduct towards the said association and the members thereof.

These affidavits shew the three defendants, Balmer, Dunbar, and Chase, were present at the time when Moriarty was with Lockwood, one of the plaintiffs, and left him, and accompanied by Chase to the station left the city ; and their presence at that time is not denied.

Fisher, the other defendant, was not present, and cannot therefore, in the absence of any direction to do the act, or any adoption of it, or the like, be made accountable for the acts of the other defendants, although the four defendants are members of the same union, and Fisher is president of it.

The perusal of the affidavits satisfies me that Moriarty

was by threats, intimidation or other unlawful and improper means, compelled or induced by those who were present on that occasion, and were members of the defendants' trade union, to give up his contract of service with or for any of the masters of the plaintiffs' association, and leave the city. And there is little reason to doubt, from the state of feeling between the masters and workmen, that there was much more violence in language and conduct, on the part of the members of the defendants' union, than the defendants represent by their affidavits. It is quite plain the masters had hired Moriarty, and that he would have entered into their service but for the acts and interference of the three named defendants and of the others acting in their aid and co-operation, and that they got the man away, and sent him out of the way of those who had hired him, purposely to prevent his working as he had engaged to do.

From the nature of the present difference between the masters and men, the object of each party is to compel the other to yield; the men will not work unless upon certain terms; the masters will not agree to these terms, and desire to get workmen; the men may not get work if other workmen will give the masters their services; the masters, if they get other workmen, will be able to go on with their business, and fulfil their contracts independently of these men. The pressure upon the masters is, to stay their business until they yield to the terms of the men. The pressure upon the men is to hire other men in their place unless they will take work upon the terms of the masters. The longer each side can maintain this state of things, the more distressing it will be for the one or other of them, although it may perhaps be equally distressing to both of them.

If the men will not work and will not allow the masters to get men to work for them, the masters must either give up their business or their contracts. This is the line of warfare so plainly marked out, and so obviously the most effective that can be adopted that it is idle to say it is

not followed, nor intended to be followed, by the workmen in such a contest. I am convinced Moriarty was improperly dealt with by the parties charged, and I am convinced the same parties plainly design and threaten to carry on the struggle by the like means.

I come to the conclusion that the case made against the three defendants is supported in fact, and that the actual hindering and molesting of Moriarty, but at any rate the threats by word and conduct to continue that course of hindrance, were done to the prejudice of the plaintiffs as master plasterers in their own right, as the act and threats are done and made against every member of the masters' association.

The second enquiry is, whether the injunction is in such a case supportable in law. The following cases are referred to on the point: *The Emperor of Austria v. Day et al.* before the Lords Justices, 7 Jur. N. S. 639, 30 L. J. Chy. 690. The defendant Day printed for the defendant Kosuth, a foreigner, in the Hungarian language, notes purporting to represent public paper money, which notes were intended to be used in the plaintiff's kingdom of Hungary in violation of the plaintiff's prerogative rights, and for the purpose of revolution and disorder in the kingdom. I will quote the language of Turner, L. J., only, who said:

"This case, as it seems to me, may and ought to be decided upon the third ground, the injury to the subjects of the plaintiff by the introduction of a spurious circulation. * * That the effect of that introduction will be to disturb the circulation, cannot, in my opinion, be doubted; and what will be the effect of that disturbance? Surely to endanger, to prejudice, and to deteriorate the effect of the existing circulating medium, and thus to affect indirectly, if not directly, all holders of property in the State. * * I agree that the jurisdiction of this Court rests upon injury to property actual or prospective, and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any

rights of property. But I think there are here rights of property quite sufficient to found jurisdiction in this Court."

In *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551, the defendants, who were officers of a trade's union, gave notice to workmen, by means of placards and advertisements, that they were not to hire themselves to the plaintiffs pending a dispute between the union and the plaintiffs. Held, that the acts of the defendants amounted to a crime, and that the Court would interfere by injunction to restrain such acts, inasmuch as they tended to the destruction or deterioration of property.

Malins, V. C., after stating some illustrations of the like effect as that following, proceeded: "So if the defendants had by constructing a material obstruction, such as building a wall, rendered access by the work people of the plaintiffs to their mill impossible. Why should the defendants be less amenable to the jurisdiction of this Court because they proceed to destroy the value of the plaintiff's property in another but not less efficacious mode, namely, by threats and intimidation rendering it impossible for the plaintiffs to procure workmen, without whose assistance the property becomes utterly valueless for the purpose of their trade?"

In *Clarke v. Freeman*, 11 Beav. 113, the plaintiff applied to restrain the sale of pills under the false representation that they were made from the prescription of the plaintiff. Lord Langdale refused to restrain the defendant because he was of opinion property was in no way concerned by the publication. But Lord Cairns, in *Maxwell v. Hogg*, L. R. 2 Ch. 310, said: "It always appeared to me that *Clark v. Freeman* might have been decided in favour of the plaintiff, on the ground that he had a property in his own name." And in *Springhead Spinning Co. v. Riley*, before mentioned, at p. 562, Malins, V. C., concurs in the opinion of Lord Cairns just quoted. In *Dixon v. Holden*, L. R. 7 Eq. 488, it was decided by Malins, V. C., that the Court had jurisdiction to restrain the publication of any document tending to destruction of property, whether consisting

Of money, or of professional reputation by which property is acquired, and the publication of a notice that the plaintiff was a partner in a bankrupt firm was restrained.

The decision in *Dixon v. Holden* was said by James, L. J., in the *Prudential Assurance Co. v. Knott*, L. R. 10 Ch., at p. 110, not to be correct in law. And the Lord Chancellor (Cairns) said : " The general propositions stated in that case appear to me to be at variance with the stated practice and principles of this Court, and I cannot accept them as authority for the present application." The like opinion was expressed also as to the *Springhead Spinning Co. v. Riley*. In *Thorley's Cattle Food Co. v. Massam*, L. R. 6 Ch. Div. 582, Malins. V. C., defends his decisions in these two cases against the observations referred to which were made upon them. In that case the plaintiff applied for an injunction because in their advertisement of it for sale the defendants published they were the proprietors who " alone are possessed of the secret for compounding that famous condiment, and carrying on business at Pembroke wharf, Caledonian Road ; " whereas the plaintiffs were equally in possession of the secret, as had been previously decided between the parties, and were equally entitled with the defendants to compound and vend the article.

The Vice-Chancellor determined the publication was injurious to the plaintiffs' trade and business. He did not, however, grant the injunction, but ordered it to remain over, to be renewed on further materials.

In *Aslatt v. Corporation of Southampton*, L. R. 16 Ch. D. 143, the Master of the Rolls was of opinion the Court could, since the Judicature Act, interfere by injunction, although property was not involved.

In *Saxby v. Easterbrooke*, L. R. 3 C. P. D. 339, after a verdict finding a libel, the Court will restrain the publication of it if it be injurious to the trade of the complainant.

From these cases the conclusion is, that any publication false in fact, injurious to property or trade, will be restrained ; and that any act done, or threatened to be done, injurious to trade or property will be restrained.

Are the acts charged against the defendants injurious, or likely to be injurious, to the plaintiffs' trade or property?

The acts charged prevent the plaintiffs from carrying on the business by which they earn their livelihood. If the *name* of a physician be property, the business of a tradesman must be property.

I am of opinion the acts complained of are acts of that nature which are within the jurisdiction to be restrained, according to the principles governing that jurisdiction.

The last question is, whether the facts shewn as cause by the defendants are sufficient to preclude the plaintiffs from having the injunction continued.

The defendants shewed that Ward, the master with whom all this difficulty has arisen, refused to pay one of the union men the union wages. That may or may not have been right: it does not influence the case now. Four others of his men struck work with him because he would not pay that man the full wages. That they had a perfect right to do.

The masters then met, and a note in the following terms was written on behalf of their association to the workmen's union:

"October 12.

"Dear Sir,—I am instructed by the above association to inform you that a resolution was passed at its last meeting, October 11, imposing a fine of \$25 on any member employing any of the men after Saturday night, and that they be not employed by any member until a suitable apology is sent to Mr. Ward.

"Yours respectfully, J. WRIGHT,

"F. BALMER, Esquire,

"Sec. M. P. A.

"Sec. T. O. P. U."

Another note of the like tenor, from the same person to the same person as the preceding letter, was also sent, but somewhat different in its terms. It is:

"That all members of above association employing the men who have left Mr. Ward be fined \$25; and if said men are already employed, to be discharged by next Saturday night.—Frank Maunders, John Duffy, Alex'r Davidson, Joe Bloomer."

The workmen answered as follows :

“Toronto, Oct'r 16, 1883.

“To the Master Plasterers' Association :

“Sir,—I am instructed by the Operative Plasterers' Association to inform you that we have passed a resolution, at a meeting, Oct'r 16, demanding you to withdraw your resolution which refers to the four men, as follows: F. Maunders, J. Duffy, J. Bloomer, Alex'r Davidson. Reply needed by 10 p. m., Wednesday, 17th inst., at our hall, cor. Shuter and Victoria sts. If not, all men that are working will be drawn from the Master Plasterers' Association at 7 a. m., Thursday morning.”

That letter is said to have been subscribed by Samuel Dunbar, and was directed to James Wright. No answer was given to it, and the men accordingly struck work.

In my opinion the masters had no right to send the letter or resolution to the men which they did.

They direct the four men to be discharged from their employment unless they will apologize to Mr. Ward, and they prohibit all the masters of that association from employing these men under the penalty of \$25.

The consequence was and is, and it was and is the very purpose of that resolution, to turn these men out of work, under the penalty imposed on any master who might employ them.

It was and is unquestionably an unjust and indefensible act upon the part of the masters' association, and I am not in the least surprised the fellow workmen of these four men resented that act as they did, and gave notice they would no longer work unless the masters rescinded that resolution.

Up to the time of that resolution the disagreement was confined to the men working for Mr. Ward, in which the men did nothing more than they were justified in doing. The masters made that which was a workshop squabble a matter of trade war, and the subject one of class strife. They aggravated the difficulty by arraying masters against men, with all the accompanying bitterness, resentment, ill feeling, and determination for victory engendered in such

a contest; and they provoked the strike which followed their ill-judged act.

It is true the masters have not used force or violence to prevent the four men from getting work; but they have used a very effectual means, and quite sufficient power to answer their purpose.

They impose a fine upon any of their body who violate the order, and it is plain that no member of such an association desires to put himself in opposition to or to set at defiance the body to which he belongs. He must therefore submit to the order pronounced under pain of violation. Payment of the fine might not even save any such dissentient from expulsion from the association. To say that a fine is not a pressure in the nature of intimidation and force as powerful at times as physical force threatened or actual, is to disregard the ordinary experiences of life. And to say that the fear of a man being tabooed by the members of his club if he should act against the wishes and interests of his association, or of being expelled from the association, does not operate by way of restraint and compulsion upon him, is to ignore the desire we all have to stand well with and be in sympathy with our friends and associates, and to have a good name in the community generally.

In my opinion the resolution of the masters was an act of the like kind committed by them against the four men who left Mr. Ward's service, as that which they complain the defendants have since committed against them. They could have ended the strike by revoking the resolution they had passed, as they were requested to do.

It was the duty of the plaintiffs to have made that resolution, and the facts connected with it, a part of their case when they applied *ex parte* against the defendants, and because they did not the injunction might perhaps in strictness have been dissolved.

That resolution, taken in connection with the facts which have just been mentioned, are, however, in my opinion, also an answer upon the merits to the application of the

masters, and I treat it, as before stated, as having been put in rather by way of answer on the merits. I strongly condemn the conduct of the men for the intimidation, threats, and violence they have exercised against the masters, and I warn them of the extreme danger they run by such manifest violations of the law.

Both parties have been and are to blame for this unhappy and ruinous state of things, and I think a little more forbearance on each side, and a more friendly and free communication, might have prevented the breach between those whose interests bind them together.

Let the masters rescind the resolution complained of, for it is one they should not have passed, and the breach will be healed.

Their common interest and their good sense will pass over what has happened, and work will be resumed on the same kindly terms as it was carried on before this difficulty occurred.

No objection was taken to the joinder of these four plaintiffs, who are suing in their own right, neither as partners, nor as representing their association and party, and having nothing in common between them in any other aspect or capacity. I have, therefore, taken no notice of their joinder. It is very probable the plaintiffs intended to sue as representing themselves and the association, but they have not done so.

The motion to continue the injunction will be refused and I shall give no costs under the circumstances of the case to either party.

Motion dismissed.

[QUEEN'S BENCH DIVISION.]

HYNES V. FISHER.

McCord and Jenkins's Case.

Injunction—Interference with process—Contempt of Court—Parties in representative capacity.

Pending the injunction in this case, (see *ante* p. 60) one P., who was not a party to the action, but was a member of the plaintiffs' association, on behalf of the association, hired one H. to work for him. McCord and Jenkins, members of the defendants' association, but not parties to the action, hearing of this went to H. and induced him to refuse to work for P. and to leave Toronto. The Court was of opinion that M. and J. knew of the injunction pending at the time. The plaintiffs did not state by their writ that they sued in any representative character, nor did they sue the defendants in a representative capacity; but the plaintiffs' affidavits stated that the plaintiffs represented their association and the defendants, theirs. On motion to commit M. and J. for contempt of process of the court.

Held, that the Master Plasterers' Association was not made a party to nor sufficiently represented in the action by the allegations in the plaintiffs' affidavits; and that no act against the plaintiffs individually having been established, M. and J. could not be held guilty of contempt for interference with the association and P.: that though the association might be added by amendment, the injunction would also have to be amended, and in the meantime M. and J. must be acquitted of contempt of the injunction as it now stood, and therefore the motion must fail.

WHILE the injunction was pending in this case Alexander McCord and David Jenkins, two members of the Plasterers' Operative Union, were alleged to have committed a contempt of the said process of the Court by acting in defiance of the terms of the injunction, and a motion was made calling upon them to shew cause why they should not stand committed for such contempt.

The affidavit of Hynes, one of the plaintiffs, stated that McCord and Jenkins were members of the said union, and they were well aware at the time they committed the acts alleged in the affidavit of William Pickard of the existence of the alleged injunction in this case, and he believed they committed the acts complained of with the full privity and authority of the defendants, and for the purpose of aiding and abetting them in disobeying the injunction.

William Pickard by his affidavit stated he was a member of the Master Plasterers' Association: that on the 12th of November he received a postal card by mail addressed to him, which card was as follows:—

"GUELPH, Nov. 9, 1883.

SIR.—Are you still in need of plasterers? Kindly let me know by return. I have written Mr. Hardy, but I did not know his address.

Yours truly,

JOHN H. REDWOOD,

Box 512 :—"

that he, *Pickard*, thereupon proceeded to Guelph, and while there, (he proceeded)

"I hired two plasterers on behalf of the Master Plasterers' Association, *Hugh Henry* and *John H. Redwood*, for the term of six months. *Henry* came with me to Toronto yesterday, intending to commence work immediately. On the way to Toronto some members of the Operative Plasterers' Union got on the train at Carleton station, and at once addressed *Henry*, who was sitting with me, and who at first declined to have any conversation with them, and I told them that *Henry* had been engaged by me, and warned them not to interfere with him. When they perceived *Henry* would have no conversation with them they rose excitedly from their seats and very loudly asked *Henry* if he was not more of a man than to come to Toronto to work during the strike, and if he did not know that by coming to work he was taking the bread and butter out of the mouths of themselves and their families, and by such solicitations and arguments they prevailed on *Henry* to break the engagement he had made with me, and to promise to return to Guelph at once. *Henry* and I arrived at the Union station about half-past eleven at night, and the said members of the Operative Plasterers' Union took his tools and carried them for him, and induced him to accompany them, and he returned to Guelph by the midnight train that night, as I believe. *Henry* had every intention, and meant when he left Guelph with me, to work as he agreed, and if it had not been for the solicitations and arguments of the said members of the said union the said *Henry* would have carried out his intention, and gone to work. The members of the said union who induced the said *Henry* to break his engagement with me are *Alexander McCord* and *David Jenkins*, both of the City of Toronto."

McCord admitted he had a conversation with *Pickard*, and a workman in company with *Pickard*, and who said he was from Guelph: "I stated to the workman the causes which had led to the said strike, and the particulars of the letter from the Master Plasterers' Association in reference to the four plasterers, when the said workman charged the said *Pickard* with having made false representations to him, and he refused to accompany the said *Pickard* farther. He came over and took a seat with me, and with *Jenkins* who was in company with me, and who is the co-defendant in this motion. The said workman afterwards returned to his home that night by train. The said man at first said he was a cooper by trade, and it is untrue that *Pickard* said to me the man was in his employ, or in the employ of the Master Plasterers' Association, or of any one else, and I did not understand the man was employed, but supposed he was coming to Toronto as a plasterer, and that if it was fairly represented to him that the Master Plasterers' Association had boycotted four men, and refused to give them employment, or allow them to obtain employment, he would not wish to come to Toronto; and I say that all I did was to represent to him the facts of this case."

He stated also that *Pickard* allowed the defendant to talk with the man: that he, the defendant, did not get excited or violent in any way, and after he had stated his case to the man the man charged *Pickard* with deceiving him, and with falsely representing the effect of the strike, and he said he would not enter his employment.

Jenkins swore that *McCord's* affidavit was true.

On 22nd November, *Blake*, Q.C., supported the motion. He cited *Russell v. The East Anglian R. W. Co.*, 3 M. & G. 104; *Kerr*, on Injunctions, 569.

Osler, Q. C., and *Fullerton*, contended that *McCord* and *Jenkins* were not within the terms of the injunction, citing *Joyce* on Injunctions, 1327; *Lindley* on Partnership. Vol. I., 4th ed. 56; *Taylor* on Evidence, 7th ed., sec 1686.

Blake, Q. C. in reply. The parties are not proceeded against as within the terms of the injunction—that is, not for a breach of it—but for contempt of the Court in interfering with the due operation and execution of the process of the Court. He referred to *Lord Wellesley v. The Earl of Mornington*, 11 Beav. 181.

On the 23rd November, it having been intimated that a *prima facie* case appeared to be made for the motion, *Osler*, Q.C., read the affidavits of the parties as above stated. The case then stood over until the 28th inst. for the cross-examination of parties on their affidavits, and for further evidence.

Jenkins, in his examination said: “I was not aware that any injunction had been granted at the time;” that is, at the time he and McCord had the conversation with Henry in the car.

Hynes, in his cross-examination upon his affidavit, said on that point that he knew “no more of the knowledge McCord and Jenkins had of the injunction than that they were supposed to know as much as the association” did to which they belonged; and he said: “I cannot state that they as individuals knew of the injunction, but the whole association knew. My belief is, they knew it was in force, from the mere fact that many of the other members of the association spoke to me about it, and said it was a mean action, &c. That is the only reason I have for saying they knew of it.”

McCord, on this point, said, Jenkins was the person who told him that Pickard was coming down with a man from Guelph, and he Jenkins got a cab, and they drove to the station, and took the train to Carleton.

Chase, the treasurer of the Operative Union, said, “I think I knew why they (McCord and Jenkins,) went out there,” (to Carleton station.) “They said they were going out: that there was a man coming from Guelph, and they thought they would see him. They would like to lay their case before the man. They were as well justified in doing that as the bosses. I think I said, ‘You can suit yourselves;”

it is none of my business.' I told him I had a writ served on me: that I could not talk to any person, * * that I could not go to Carleton. * * I told him they had served me with an injunction, and that I could not even speak to a man on the street. I don't know that they understood what I said to that effect. There was another party there. Whether it was McCord or Jenkins I do not know; and whether I told these two parties I had been served with an injunction I could not say positively. I don't remember whether I told them or not I was served with an injunction."

McCord knew of the injunction before the day he and Jenkins went to Carlton station.

Jenkins, in his affidavit of the 19th of November, said, "I was not served with any injunction notice herein, and never saw the same, and did not know that any notice, rule, or order had been made that interfered with me in any way, or with my liberty of action." That affidavit was made by Jenkins in answer to Hyne's affidavit of the 11th of November, in which Hynes stated that McCord and Jenkins "were well aware at the time they committed the acts alleged in Pickard's affidavit of the existence of the injunction granted herein." Another part of the case discussed on the enlargement was whether McCord or Jenkins had said anything in answer to that part of Pickard's affidavit in which he stated that McCord asked, or said to Henry, "if he was not more of a man than to come to Toronto during the strike, and if he did not know that by coming to work he was taking the bread and butter out of the mouths of themselves and their families." McCord did say in his examination on being asked: "Q. And you did not say anything to him about what kind of a man he was if he came down here? A. No. Q. Did'nt you say that he would be a mean man if he came down here to work? A. No, I never made use of that word."

Besides that, he states what he says was the whole of the conversation he had with Henry at that time, and the above statement forms no part of it.

McCord did not in his original affidavit deny that statement, which **Pickard** had in his affidavit expressly sworn to

Pickard, in his cross-examination upon his affidavit, said that **McCord** said in the car: "If you" (Henry) "are a plasterer, and a mechanic, and understand the way the strike originated, and have to earn your bread and butter the way we do, you will go and stand up for your fellow men, and just then Henry began to cry, and he turned to me and said, 'Pickard, I have worked with you a good while, and you have treated me well, but I can't go back on my fellow men.'"

Another matter discussed on the enlargement was whether **Pickard** hired Henry for himself, or for the Master association.

Pickard, in his original affidavit, said: "While at Guelph I hired two plasterers on behalf of the Master Plasterers' Association," and in his examination he said as follows: "Q. Had you an agreement with him at all? A. Yes. Q. An agreement on your own account? A. Yes. Q. He agreed to work for you? A. He agreed to work for the association, but it was understood I was the man he was to work for under the association."

The original affidavits of **McCord** and **Jenkins** stated that after they had told their case to Henry, and that the strike was not ended, but was still going on, Henry "charged **Pickard** with having made false representations to him, and refused to accompany him farther." That statement they repeat in their examination. **Pickard** in his examination said: "Q. Was that the time (in the car) that Henry charged you with misrepresentating things to him? A. No, he never did. Q. Didn't he tell you that you had misrepresented things to him in Guelph? A. No. Q. Did he say any words to that effect? A. No, he didn't say so at that time, nor at any time. Q. Did you as a matter of fact tell him the strike was over? A. No."

Henry stated in his affidavit that **Pickard** did tell him "the strike was over, and that if there was any danger I should be protected, and I said I did not want to go to

Toronto to work until the plasterers strike was ended," and he said that after his conversation with McCord, finding the strike was not over, he said to Pickard, "he had deceived me as to the said strike being ended."

Henry, in his cross-examination, said: "I discovered on the train that the man I was with (Pickard) had misrepresented things to me. The misrepresentation was, that he said to me in Guelph the strike in Toronto was over. The two men who got on the train at Carlton told me the strike was not over, that they were on strike: that his hiring was conditional on the strike being over."

He did not say he told Pickard that he had deceived him, or misrepresented to him anything about the strike, or about anything else.

On the 1st of December, 1883, the case came on again upon the further evidence, of which the principal points in dispute are noted above.

S. Blake, Q.C., O'Sullivan with him, contended the case was fully proved against McCord and Jenkins, and on the authorities before mentioned, and on the case of *The People v. Sturtevant*, 9 N. Y. 263, 278, and the work of *High on Injunctions*, 504, the process for contempt should issue.

Osler, Q.C., and Fullerton, contra. Jenkins was not served with or notified of the injunction at any time before the acts complained of were done. He swears positively he did not know of the injunction, and there is no evidence, and there should be positive evidence, that he did. As to the acts done they were nothing more than they were justified in doing, representing the true state and cause of the difficulty between the masters and the workmen: that Henry was hired upon the understanding that the strike was over, and when it was not over there was no longer any engagement. Henry was in fact deceived by Pickard in that respect, and left him because he had been deceived. Besides the case which has been made upon the merits, there was the important point before discussed. This action is one by Hynes and his three co-plaintiffs in their

own right against Fisher, and his three co-defendants in their own right, and the claim is for damages for that the defendants intimidated the servants and workmen of the plaintiffs, wrongfully inducing and enticing them to leave the plaintiffs' employ, and maliciously procuring the breach of contract between the plaintiffs and their workmen; and the plaintiffs ask an injunction restraining the defendants, their workmen or agents, from a further continuance of such unlawful acts. And the injunction follows the claim endorsed upon the writ of summons, restraining "the defendants, their servants, workmen, or agents from hindering or molesting the plaintiffs from hiring or employing workmen, and from intimidating, hindering or molesting those who are working, or may be prepared and willing to work for the plaintiffs." The complaint against McCord and Jenkins is, that they hindered and molested Pickard from hiring or employing Henry, a workman, and hindered and molested Henry, who was prepared and willing to work for Pickard, from working for him; but Pickard is not a plaintiff, nor is he within the terms or protection of the injunction. It will be contended for the plaintiffs that they are prosecuting this action on behalf of themselves and the other members of the Master Plasterers' Association; but they are not so proceeding, and if they were Henry was not employed or hired by the association, or for it, but for Pickard. In no way therefore can it be said McCord and Jenkins, however clearly the fact of hindrance and molestation may be proved against them, have committed any act whatever against the terms of the injunction.

Blake, Q.C., in reply. This action is between the Master Plasterers' Association, on the one side, and the Operative Plasterers' Union, on the other side. Pickard is a member of the Masters' Association, and hired Henry for that association, and through the association Pickard was to get the services of Henry. The affidavits used on the motion for the injunction, and those against the continuance of it, shew the plaintiffs' names were used as representing the Masters' Association, and that the writ of summons

and the injunction do not mention that the plaintiffs are suing for the association, or for and on behalf of themselves, and all the other members of the association; and although the affidavits may not be intituled in that form, it is not an objection against the real substance and subject of the action, which is one for and on behalf of the plaintiffs and the other members of the association, for the omission so to describe the actual plaintiffs cannot alter the character of the action. If it be an irregularity not to describe the plaintiffs as it is said they should have been described, such an objection cannot be taken in the manner and at the time now raised by the parties called upon to answer for their contempt. But if the action is to be considered as the action of the four plaintiffs in their individual right, they are still entitled to maintain this motion, because they are in fact members of the Masters' Association, and the man Henry was employed by Pickard for the association, and the plaintiffs are interested, as members of the association, in having the men who are hired for it left free from the hindrance and molestation of others to prevent such men from working for the association.

December 4, 1883. WILSON, C. J.—It is clear that no person is allowed to question the propriety of issuing any process or order of Court, on a motion to commit for contempt of the Court, in respect of such process, or order, so long as the same remains in force. The Court will not entertain such objection on a question of disobedience of that process or order. The Court, however, on a motion for contempt, may consider all the facts and circumstances of the case upon which the process issued, or the order was made: *Russell v. East Anglian R. W. Co.*, 3 M. & G. 104, reported also in 14 Jur. 1033.

The case of *Lord Wellesley v. The Earl of Mornington*, 11 Beav. 181, is also clear authority that any one wilfully assisting in a breach of the writ or order of the Court, or in defeating its purpose, or in preventing its execution, with knowledge or notice of such writ or order, is, although

not within the terms of the writ or order, subject to liability for contempt of Court.

The next matter I have to consider is whether the parties had notice or knowledge of the injunction, or, more properly, restraining order. McCord admits he had, but he thought it did not affect him, or prevent his free action, just as if no such order had been made.

Jenkins denies having had any notice or knowledge of it, and the material facts relating to that matter are stated above. It is strange that Jenkins in his original affidavit, made in answer to that of Hynes which was filed against him, and in which Hynes swore positively both Jenkins and McCord "were well aware of the injunction," should have contented himself with saying he was not served with it, nor ever saw it, and he did not know that any order that had been made interfered with him—if in truth he had no notice or knowledge of it at all. Then again Chase in his examination swears positively that he told McCord and Jenkins he had been served with an injunction, and he could not go to Carlton about the man they were talking of Pickard bringing from Guelph, but they could suit themselves; yet immediately after that positive declaration Chase said: "Whether I told McCord and Jenkins I had been served with an injunction I can't say positively. I don't remember whether I told them or not I was served with an injunction." It is scarcely possible to believe one who swears in that manner. Yet I am disposed to believe his first statement, that he did tell them he had been served with the injunction; because he was telling them why he could not go to Carleton, and why he could not talk to any person, but they might suit themselves by going; and that his later statement was an attempt to do away with what he had disclosed adversely to his friends.

It is also very difficult to believe that McCord did not tell him of the injunction which he McCord knew all about, and probably also every member of the Operative Union.

Taking the almost direct admission by Jenkins in his

original affidavit, that ne did know of the injunction, but thought it did not affect or interfere with him, made at a time when he was charged with full knowledge of it, and thereby challenged to deny it, with the other circumstances just mentioned, I am of opinion Jenkins as well as McCord had notice and knowledge of the injunction before they did the acts which are now complained of against them.

The next enquiry is, whether the acts charged upon McCord and Jenkins have been proved. Pickard, in his original affidavit, stated, among other matters, that McCord, while in the car from Carlton to Toronto, made use of the following language to Henry in the presence of Jenkins, who was acting in combination with McCord: "If he (Henry) was not more of a man than to come to Toronto to work during the strike, and that if he did not know that by coming to work he was taking the bread and butter out of the mouths of themselves, and their families; and by such solicitations and arguments they prevailed on Henry to break his engagement with me, and to promise to return to Guelph at once;" and Henry did return to Guelph by the midnight train, in about half-an-hour after his arrival here.

Neither McCord nor Jenkins denied that in their original affidavits; but McCord, in his examination, does, in effect, deny having used such language, although not so fully as might have been done. McCord, in his examination, in effect, although not in his former language, repeats what he before said.

In a struggle of this kind it is not an easy matter to keep within such limits as may be prudent, and particularly when the parties, as McCord and Jenkins say was the case with them, do not think they are fettered in any way by the injunction, and that their liberty of action was interfered with. Now Henry, in his examination, says, if his evidence can be relied upon for any purpose—although, if it can, it may be used when it is adverse to the party whose witness he is—that McCord and Jenkins said on the car, "the were on strike, and that they were preventing outside me from coming in to Toronto;" and Redwood, the other m

engaged by Pickard at Guelph, in his examination, said : "I did not go to Toronto partly because I was offered another job here, and partly because I thought it would not be safe for me to go to Toronto. I knew about the strike about a week before I met Pickard. I was told by a member of the Plasterers' Union of Toronto that it wouldn't be safe for any plasterer to go to work in Toronto. He said the plasterers were on strike there, and that there were a great many Irish labourers there who wouldn't stop at anything if strangers came in to Toronto to work. He said Chase was chairman or president of the union, and was in Guelph representing the union for the purpose of preventing plasterers here from going to Toronto, and that wherever the boss plasterers sent for men the president of the union sent pickets to prevent the men there from coming to Toronto." A strike carried on in which such means are taken to prevent the masters from hiring men, and in which there is such danger to be feared, is not likely to be carried on with the moderation which is described by the preventing parties, who have their members and pickets at the outlying places where men are being engaged, and who are watching along the line of travel, and at the railway stations, to intercept all workmen coming to Toronto for hire and employment by the master plasterers. I am of opinion, on this part of the case, that McCord and Jenkins did hinder and molest Pickard from getting the services of Henry either for himself or for the master plasterers, and that they did hinder and molest Henry from entering into such service, as alleged against them.

The reason I do not believe Henry's account of the matter is, that Pickard, in his examination, said he knew Henry well ; they used to work together. He also said that Henry said to him, after McCord and Jenkins had been speaking to Henry : "That it was pretty tough, that he had known me (Pickard) a good while, and worked with me, and didn't care to go back on me ; but that he could not go back on his fellow men."

McCord, also, in his examination said that Henry said

to Pickard in the car, "*Bill*, you have misrepresented the thing to me, &c." Yet Henry, in his examination, said: "I can't say that I know William Pickard; I never made any engagement with any one to go to work in Toronto; I don't know the name of the man I went to Toronto with; I didn't hire with the man I went with." And so he goes on in his examination throughout speaking of Pickard as "the man I went with," and he says in many passages later on in his examination he did *hire* with that man, and he did *engage* with him.

I do not believe Pickard represented to Henry at any time that the strike was over. Pickard asserts he never did, and Henry, in his examination, does not say Pickard did so, although he does say it in his affidavit. McCord and Jenkins say, Henry did in the car charge Pickard with deceiving him. In the absence of Henry's asserting it on his cross-examination, and on Pickard's evidence, I am inclined to think that it is more than doubtful, notwithstanding the statements of McCord and Jenkins to the contrary, that Henry did make any such charge in the car against Pickard; but I am quite convinced that Pickard did not tell Henry at any time the strike was over, whatever Henry chose to say in the car, if he did say so, in excuse for his breaking his engagement with Pickard.

I am of opinion the facts and evidence shew a plan and scheme laid down and devised, and systematically followed by the operative union members, to prevent the master plasters from hiring or employing men; and that McCord and Jenkins did so hinder and molest Henry, as aforesaid, in pursuance of that scheme, and in doing so that they were carrying out the objects and purposes of the several members of the union. Their language was more than a mere statement of the case, leaving Henry thereupon to exercise his own free independent judgment.

The remaining questions are more important ones:

1. Whether upon the writ of summons and restraining order, or injunction, McCord and Jenkins can be charged with committing a contempt of the Court, in hindering and

molesting Pickard from hiring, employing, or getting the services of Henry as a plasterer, either for himself or for the master plasterers?

2. Is Pickard within the terms of the injunction by reason of his being one of the Master Plasterers' Association?

3. Is the Master Plasterers' Association a party to these proceedings? That is, do the first named plaintiffs represent them in this action, and in these proceedings?

4. Are the plaintiffs, if suing in their own right, entitled to claim protection against the acts of the defendants, or against McCord and Jenkins, on this motion by reason of their being members of the Masters' Association, assuming the acts complained of were done against that association?

5. Were the acts done against the association?

It is a rule that a creditor may sue on behalf of himself and all other creditors. Until decree the suit is in the sole control of the plaintiff creditor, and during that time any other creditor may commence his suit without regard to the pending suit of the first creditor. When a plaintiff sues on behalf of himself and of others of a similar class he should state his case in that part of the bill which sets out the names and addresses of the plaintiffs. The omission of such a statement will in many cases render a bill liable to objection for want of parties: *Daniell's Chancery Practice*, 5th ed, 216, and the cases there cited; and in other cases will deprive the plaintiff of his right to the whole relief which he seeks to obtain.

Then, it is said, a creditor suing for satisfaction of his debt out of the real and personal estate of his debtor, and not stating that he sues "on behalf of himself and the other creditors," can only have a decree for satisfaction out of the personal estate in a due course of administration, and not for satisfaction out of the real estate: 1 *Daniell's Chancery Practice*, 5th ed. 302, and the cases there cited. An amendment, however, may be made in that respect: *ibid.*, or the bill may after decree be taken to be a bill on behalf of

all other creditors in order to reach the real estate: *Woods v. Sowrby*, 14 W. R. 9. In the affidavit of Hynes for the injunction he states he is president of the Master Plasterers' Association: that Wright, a co-plaintiff, is secretary of it, and Lockwood and Hardy, the other two plaintiffs, are members of it; and that Fisher, one of the defendants, is the president of the Operative Plasterers' Union; Balmer, a co-defendant, is secretary, and Dunbar and Chase are officers, or members of it, and that Chase is the chairman of the strike committee of the said union. The affidavit further represents that the plaintiffs represent the Master Plasterers' Association, and the defendants represent the Operative Plasterers' Union.

The writ of summons, under the practice before the Judicature Act, was not required to describe any special character in which the plaintiffs sued: it was sufficient to describe them in their special character in the declaration. The writ could not be enlarged in that respect, but could be restricted. Since the Judicature Act, by Rule 98 of that Act, "where there are numerous parties having the same interest in one action, one or more of such parties may sue, or be sued, or may be authorized by the Court to defend in such action, on behalf of or for the benefit of all parties so interested:" *MacLennan's Judicature Act* 150, and the cases there cited upon that rule.

Then, by Rule 13, it is provided that "if the plaintiff sues in a representative capacity, or if the defendant, or any of the defendants, is sued in a representative capacity, the indorsement shall shew, in manner appearing by the statement in appendix A. hereto, part 2, sec. 5, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues, or is sued;" and, by reference to the place mentioned at p. 378 of *MacLennan's* work, the claim must be expressed thus: "The plaintiff's claim is as executor of C. D. deceased, for &c.," or as the case may be. If the statement of claim shew the plaintiff is suing on behalf of himself and other creditors it is not necessary to amend the writ by the insertion of those words: *Eyre v. Cox*, 24 W. R. 317.

In the case in hand the claim endorsed on the writ does not show the plaintiffs sue in any other character than in their own personal right, and in the injunction granted the plaintiffs are described in the like manner as litigants in their individual capacity. There is an express allegation in the plaintiffs' affidavits that the plaintiffs do represent and are representing the Masters' Association, but that is not sufficient formally to constitute the action one of that nature.

I do not see, therefore, how it can possibly be maintained that McCord and Jenkins have done any act against the plaintiffs personally by their interference with Pickard, nor how it can be said they are guilty of contempt by interfering with the Master Plasterers' Association, when that body is not a party to these proceedings by representation or otherwise. The case of *Lund v. Blanshard*, 4 Hare 290, shews an amendment of the writ of summons, or at any rate of the claim endorsed upon it, would require to be made to enable the plaintiffs to proceed against the defendants, or any others, for acts of interference with the Masters' Association; and the injunction would, of course, have to be amended in like manner; but that involves the necessary consequence that McCord and Jenkins must be acquitted from their alleged contempt of the process or order as it now stands.

I discharge the motion to commit these two men for the alleged contempt laid against them, but without costs, because the case made for them has not, in my opinion, been fully or fairly stated; I may say has not been truly stated; and because the other objections they have raised have not been sustained; and I desire they should distinctly understand that they are acquitted as much for what may, to some extent, be called a point of form, rather than one of substance.

Motion dismissed without costs.

[QUEEN'S BENCH DIVISION.]

FOOTT V. RICE ET AL.

Deficiency from false survey—Compensation—Trusts declared of original lot—Disclaimer by cestui que trust—Improvements under mistake of title—Estoppel of married woman—Restraint against anticipation.

G.W. F., being the patentee of a certain lot described as of 200 acres, but in which there was a deficiency, conveyed half of the lot to J. B. P., who conveyed it to trustees, to hold in trust for E. F., wife of G.W. F., upon certain trusts declared in the deed, and without power to her to anticipate. The deficiency was subsequently discovered and upon the application to the government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land as compensation for the deficiency was made to the trustees of E. F., describing them as such. Subsequently an instrument under seal, expressed to be made between J. B. P., of the first part, and E. F., wife of G.W. F., of the second part, and the trustees of the third part, which recited the facts and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. and E. F., whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the trustees held them as trustees for G. W. F., the patentee of the original lot. After this the trustees, by the direction of G. W. F. conveyed to E., under whom the defendants claimed. E. F. now brought this action to recover the land.

Held, [HAGARTY, C. J., dissenting] that E. and those claiming under him must be held to have had notice of the title of the trustees, who were described in the patent as trustees of E. F.: that this land was subject to the trusts of the previous conveyance to them: that E. F. was not estopped by the declaration executed by J. B. P. and herself, which did not divest her of her title, and that therefore she was entitled to recover.

Held, also, that there should be a reference to the Master to take an account of taxes paid and permanent improvements made upon the lands, further consideration being reserved.

Per HAGARTY, C. J.—The legal estate being in the defendant by conveyance from the trustees, the plaintiff should show an equity to recover what she claimed as part of the trust estate, which she had not done; that the patent to the trustees, though describing them as such, did not in terms declare any trust respecting this land, and it could not be assumed that it formed part of the trust premises.

Per ARMOUR, J.—The case was not within R. S. O. ch. 95, sec. 4, as to improvements under a mistake of title, but was governed by the principles of equity governing the relationship of trustee and *cestui que trust*.

Per CAMERON, J.—The case was within the statute.

ACTION for recovery of land.

The statement of claim alleged that the plaintiff was the widow of the late George W. Foott: that by the provi-

sion of a certain deed of January 15th, 1852, James Beatty and Albert Prince became the trustees of the plaintiff of the east half of lot 16, in the front concession of Dover east, county of Kent, upon trust to permit the plaintiff to occupy said land, and to recover and take the rents and profits during her life, and after her death upon trust for such person as she might give or devise the same to; and that the plaintiff should not do, suffer or permit any act to sell, change or assign the same, or the rents or profits thereof; and that in case she should violate the said trusts said land should revert to the settlor, James B. Perrier, who executed said deed, and made said conveyance in pursuance of the will of Sir Anthony Perrier, whose executor said James B. Perrier was: that said trustees accepted the said trusts and acted therein: that in or about the year 1856, it was discovered that said half of said lot 16, in the front of Dover, was deficient in the quantity of land which it was supposed to contain, and which was purported to be patented, and the Government of Canada, on March 6th, 1857, granted to said trustees, Beatty and Prince, as trustees for the plaintiff, and on the trusts of said deed of January, 1852, among other lands, lot 4, in the 11th concession of Chatham, in the county of Kent, as compensation for the deficiency in the quantity of land so patented in Dover east, and the said trustees accepted the same in the terms of said trusts: that subsequently said trustees pretended to sell and convey the lands to one Emery, but said trustees had no power or authority to sell or convey the same, nor to part with said lands, and the plaintiff was entitled to the possession of the same under the terms of said trusts: that said plaintiff was during all said time, until April 1881, under coverture: that defendants had recently taken possession of said land, and claimed the same under and through the conveyance made by said trustees to said Emery; and the plaintiff claimed possession and mesne profits.

The statement of defence and counter claim alleged that defendants were in possession of said lands: that said lot

number 16, in front on the River Thames, in the township of Dover east, was patented to George Wade Foott, husband of the plaintiff: that said Foott, on August 12th, 1837, conveyed the east half of said lot to James Black Perrier in fee: that Sir Anthony Perrier, father of plaintiff and said James Black Perrier, by his will of 18th February, 1845, declared it as his wish and desire that said James Black Perrier should relinquish his estate in said land in favour of the plaintiff, and assign his interest to or in trust for the plaintiff, her heirs and assigns forever, free from her said husband's debts and control: that said James Black Perrier did, at the request of said plaintiff, convey said land by said deed as mentioned in plaintiff's statement of claim, and upon the trusts therein stated: that afterwards, about the year 1856, said Foott had said lot 16 surveyed, and found that it did not contain the acreage in said patent, and there-upon compensation for the deficiency, about 42 acres, was sought, and an allotment of land equivalent in value to such deficiency was authorized to be made to said Beatty and Prince, the trustees, subject to approval when allotted: that the patent to the Crown to said trustees issued March 26th, 1857, granting to them said land in plaintiff's claim mentioned, on account of such compensation, but containing no other reference whatever to said trusts: that said patent was so issued to said trustees nominally as trustees of Ellen Foott, for the use and benefit of the said George Wade Foott, who was entitled to the same in his own right as patentee of said lot 16: that by an instrument under seal of June 4, 1857, between said James Black Perrier, of the first part, the plaintiff of the second part, and said trustees of the third part, the parties of the first and second parts declared that they were not in any way interested in said lands so given for compensation, and that the parties of the third part held said land as trustees of said George Wade Foott, and not otherwise and that they were to dispose of said lands as said Foott might direct and appoint: that on November 2nd, 1864, said trustees, by the direction of said George Wade,

Foott, conveyed said land to A. Emery ; and the defendants claimed to be the owners in fee in possession of said lands under title derived from him: that the defendants claimed the benefit of the laws relating to the registration of the title to lands in Ontario as against the trusts contained in the conveyance from James Black Perrier to said trustees of the east half of said lot 16 to her separate use, the same, if intended to cover, not being registered against the land in question in this suit: that by reason of the recitals statements, declarations, and directions contained in the deed of June 4th, 1857, plaintiff was estopped from claiming any interest in said lands; and that plaintiff's claim, if any, was barred by her acquiescence in the conveyance of said land to said A. S. Emery, and by lapse of time: that said patent to the land in dispute in this cause having been granted to the said trustees, defendants were entitled to same under the deed made to said Emery, and the subsequent conveyances thereof made to them as the assigns of said trustees in any event. And defendants, by way of cross-relief, prayed that it might be adjudged that they were entitled to said land as against said settlement and said trusts to the separate use of plaintiff thereby created, or otherwise; and defendants further stated that when said land was conveyed to said Emery it was wet marsh land and of very little value, and had thereafter been subjected to very heavy assessments for drainage as well as other taxes, which said Emery or those claiming under him, with the defendants, had had to pay, and the defendants had made divers valuable improvements on said lands of a permanent nature; and defendants charged that they were entitled to be repaid all such taxes and interest thereon, as well as the value of such improvements, with interest thereon, in case it should be held that they were not entitled to said land, and they claimed the benefit of the statutes relating to improvements made under a mistake of title.

The case was tried at the last Spring Assizes, at Chatham, by Cameron, J., without a jury, when the following facts appeared:

On the 5th of February, 1838, the Crown granted to George Wade Foott lot number sixteen in the first concession of the township of Dover East, describing it as follows: "All that parcel or tract of land situate in the township of Dover (eastern division), in the county of Kent, in the western district in our said Province, containing by admeasurement two hundred acres (with allowance for roads), be the same more or less, being composed of lot number sixteen in the front or first concession upon the river Thames of said township of Dover." Prior to the said grant, and on the 12th day of August, 1837, the said George Wade Foott, by deed of bargain and sale bearing that date, and made between the said George Wade Foott and one James Black Perrier, for the consideration of £220 paid to him by James Black Perrier, conveyed to him, the said James Black Perrier, in fee, the eastern half of lot number sixteen in the first concession of the township of Dover, "*containing one hundred acres more or less.*"

On the 3rd of November, 1848, George Wade Foott, by deed poll of that date, after reciting the last mentioned deed, and that he was at the time of the making thereof equitably seised of the land thereby conveyed, and that since the making thereof, and on the 5th day of February, 1838, the Crown had granted to him the whole lot number sixteen, and that he thereby became legally seised thereof, granted, released, aliened, and confirmed unto James Black Perrier, his heirs and assigns, all that parcel of land commonly known as the east half of lot number sixteen in the first concession of the township of East Dover, "*containing one hundred acres more or less.*"

Sir Anthony Perrier, the father of James Black Perrie and of the plaintiff Ellen Foott, the wife of George Wade Foott, died on the 24th day of April, 1845, having previously thereto, and on the 18th of February, 1845, made his last will, in which was contained the following proviso devise and bequest; "Whereas my said son James Black Perrier is, under and by virtue of a certain indented deed of assignment or conveyance, bearing date the 12th day

August, 1837, executed between him and his brother-in-law George Wade Foott, esquire, well and legally seised and possessed of a certain parcel or tract of land and premises situate in the township of Dover, in the county of Kent, and Province of Upper Canada, to hold unto him the said James Black Perrier, his heirs and assigns forever, freed and discharged from all incumbrances whatsoever, it is now my wish and desire that my said son James shall relinquish all and every his estate, interest and claim in said tract of land and premises, and every part thereof, so situate as aforesaid and derived by him under said deed, in favour of my said daughter Ellen Foott, and assign and make over such interest by fit and proper deeds to be executed by him, to or in trust for my said daughter Ellen Foott, her heirs, executors, administrators, or assigns, forever, free from the debts, control, or intermeddling of her husband, the said George Wade Foott, in any way whatsoever; and placing full confidence and reliance in my said son James that he will comply with such my wish and desire by executing such deeds of assignment or conveyance as he may be called upon or required by the said Ellen, her heirs, executors, administrators, and assigns, for the purpose aforesaid, then and in such case only, and not otherwise, I leave, devise, and bequeath unto him the said James Black Perrier, his heirs, executors, administrators, and assigns, all and every my estate and interest and term for years yet to come and unexpired, and the rents, issues, and profits in that part of the lands of Shonakeil, alias Sunday's Well, situate in the north liberties of the city of Cork, held under the Earl of Cork and Orery, and which premises were assigned to me by Thomas Gibbings, esquire, deceased, but subject to the yearly head rent payable thereout and covenants in the original indenture of lease contained."

By indenture executed by all the parties thereto, bearing date the 15th day of January, A. D. 1852, and made between James Black Perrier, of the city of Cork, in that part of Great Britain called Ireland, esquire, son of the late Sir Anthony Perrier, of the same place, deceased, of the

first part; Ellen Foott, wife of George Wade Foott, of the township of Dover East, in the county of Kent, in the western district and Province of Canada, esquire, and daughter of the said Sir Anthony Perrier, of the second part; and James Beatty, of the town of Chatham, in the said last mentioned county, district and province, merchant, and Albert Prince, of the town of Sandwich, in the county of Essex, in the said western district, esquire, of the third part—after reciting the said deed of the 12th of August, 1837, and the said provision, devise, and bequest in the said will of the said Sir Anthony Perrier, the death and the date of the death of the said Sir Anthony Perrier, and that the said Ellen Foott had called upon and requested of the said James Black Perrier, by requisition under her hand, dated the 17th of April, A. D. 1851, to execute this present assignment in trust for her sole use and benefit, with which request he consented and agreed to comply—it was witnessed that for the purpose of carrying out the intentions of the said Sir Anthony Perrier, deceased, so expressed in the said hereinbefore recited part of his said will, and vesting in trustees to the use and for the benefit of the said Ellen Foott during her life time, and for the benefit of her children after her death, the parcel or tract of land so conveyed to the said James Black Perrier, as hereinbefore mentioned, and in consideration of the premises, and in further consideration of five shillings, &c., he, the said party of the first part, at the special instance and request and by the direction of the said Ellen Foott, testified by her being an executing party thereto, did thereby grant, bargain, sell, assign, alien, transfer, convey, make over, relinquish, and confirm unto the said James Beatty and Albert Prince, parties of the third part, their heirs and assigns, all and singular, the said easterly half or moiety of the said lot number sixteen in the first concession of the township of Dover East, aforesaid, * * to have and to hold the said last mentioned lands, hereditaments and premises, and every part thereof, with the appurtenances, unto the said James Beatty and Albert Prince, and the



survivor of them, and the heirs and assigns of such survivor, for ever, upon the trusts and to and for the several ends, intents, and purposes thereafter declared of and concerning the same, that is to say: upon trust to permit and suffer the said Ellen Foott to occupy the said hereditaments and premises, or to receive and take the rents, issues, and profits thereof, and of every part thereof, for and during the term of her natural life, without impeachment of waste, and after death upon trust for such person or persons, and for such ends, intents, and purposes as the said Ellen Foott should, by any deed to be executed by her in the presence of two credible witnesses, or by her last will and testament to be duly executed, convey, appoint, give, devise, or bequeath the said hereditaments and premises, and every part and parcel thereof; and in default of any such conveyance or appointment, gift, devise, or bequest by her the said Ellen Foott, then in trust for the right heirs of the said Ellen Foott, for ever; and it was thereby agreed and declared that the receipt of the said Ellen Foott alone should be a good and sufficient discharge to the person or persons paying any rent for the said hereditaments and premises; and that no part thereof, or of the said lands and premises, should be liable or subject to the debts, control, or engagements of her husband, the said George Wade Foott, but should be for the sole and separate use of the said Ellen Foott; and it was further agreed and declared that these presents were upon this express condition, that the said Ellen Foott should not and would not, at any time during her life, sell, assign, alien, transfer, convey, make over, or in any way affect, charge, incumber, or prejudice the said eastern half or moiety of said lot of land so thereby assigned for her sole use and benefit, to the said parties of the third part, or any part or parts thereof, or do, or cause, or permit, or suffer to be done any act, matter or thing whatsoever which would, could, should or might in any way tend to reduce or diminish the annual profits to arise from said lands and premises, or which could or might in any manner have the effect of preventing the said Ellen

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during the full continuance of her life from being in actual enjoyment and perception of the yearly rents and a thereof upon her own sole and separate receipt, notwithstanding her coverture. And it was also further agreed declared that should the said Ellen Foott violate said agreement in any way whatever, or cause or permit it to be done without the sanction and concurrence of the said party of the first part, in writing, being first had and obtained, then immediately thereupon the said assignment and every covenant, matter and thing therein contained should cease, determine, and be absolutely null and void to all intents and purposes, and the said lands and premises so thereby assigned, or intended so to be, should immediately revert to and be vested in the said James Black Perrier, his heirs and assigns, the same and in like manner as if said deed had never been executed, anything therein contained to the contrary thereof in anywise notwithstanding.

Next was a copy of a report of a committee of the Honourable the Executive Council, dated 12th September, 1856, approved by His Excellency the Governor General in Council on the 15th of same month, as follows: "On the petition of George Wade Foott, for compensation for deficiency of forty-two acres in lot No. 16, in the Front of first concession, upon the River Thames, in the township of Dover east, the said lot having been patented to him containing 200 acres, but has been recently discovered contain but 157 acres, 2 rods, 4 perches—the present application is put forward on behalf of William Lumley Perrier and Anthony Perrier, trustees for Mrs. Foott as to west half, and James Beatty and Albert Prince, trustees as to the east half—the Honourable the Attorney-General for Upper Canada is of opinion that compensation may be safely made to those trustees, and moreover, that Foott himself might have personally claimed such an allotment of land equivalent in value to the deficiency authorized; the value of the 42 acres in re-

grant made to Mr. Foott to be ascertained by the local agent, and the appropriation in lieu thereof to be based subject to approval upon such estimate of value."

Under this order in Council the lands in question were granted, on the 26th day of March, 1857, "unto James Beatty, of the City of Detroit, in the State of Michigan, Esquire, and Albert Prince, of the Town of Sandwich, in the County of Essex, barrister, trustees of Ellen Foott, wife of George Wade Foott, in compensation for deficiency in the east half of lot number 16, in the front concession, on the Thames, of the township of Dover East "

By a power of attorney duly executed by the said James Beatty and Albert Prince, on the 12th day of January A. D., 1856, they authorized George Wade Foott to act for them as their attorney in obtaining from the Government any compensation that might by the Government be granted to them either in money or otherwise for and in respect of the deficiency that there was in the quantity of land contained in the east half of lot numbered 16, in the first concession of the township of Dover East.

It appeared that very shortly after the issue of the grant to Beatty and Prince George Wade Foott, incited thereto by the opinion of the Attorney-General above referred to, formed the design of attempting to rescue the lands granted from the trust, and to procure their appropriation to his own use, and the following instrument was prepared: "This indenture, made the fourth day of June, A.D. 1857, between James Black Perrier, of the City of Cork, in that part of Great Britain called Ireland, of the first part; Ellen Foott, wife of George Wade Foott, of the Township of Dover East, in the County of Kent, of Canada, Esquire, of the second part, and James Beatty, lately of Chatham, in Kent aforesaid, now of Detroit, in the State of Michigan, in the United States of America, Merchant, and Albert Prince, of the Town of Sandwich, in the County of Essex, of Canada, Esquire, of the third part: Whereas by deed, dated the fifteenth day of January, A.D. 1852, the said party of the first part did convey to the said

parties of the third part the lands known as the easterly half part of lot numbered 16, in the first or front concession of the township of Dover East, in the said county of Kent, upon certain trusts therein declared of and concerning the same, which trusts were for the benefit of the said Ellen Foott; and whereas certain lands have been ordered by the Government of Canada to be granted to the said parties of the third part as such trustees, as a compensation for a certain deficiency in the quantity of the said eastern half of said lot 16, but the said parties of the third part have no real interest therein, either as such trustees or otherwise, they having been named as grantees of such compensation merely from their being the present owners of the said east half of lot 16; and whereas the beneficial grantee of said compensation is George Wade Foott, the husband of the said Ellen Foott, and the original purchaser of said eastern half of said lot 16; and whereas the said parties of the first and second parts desire by these presents to declare that the said parties of the third part are the nominal and not the beneficial owners (either as trustees or otherwise) of the said lands so granted as compensation,—Now, this indenture witnesseth that the said parties of the first and second parts, for the considerations aforesaid, and in further consideration of five shillings to each of them now paid by the said parties of the third part, the receipt whereof is hereby acknowledged, do hereby declare as follows: (1) The said parties of the first and second parts are not, nor are either of them, their heirs, executors, administrators or assigns, in any way interested in the said lands so ordered to be granted as compensation for such deficiency. (2) The said parties of the third part hold the said lands so ordered to be granted as trustees of or for or attorneys for the said George Wade Foott, and not otherwise, and to dispose of such lands as the said George Wade Foott may by instrument under his hand and seal direct and appoint. In witness whereof, &c.”

This instrument was executed by James Black Perrier and Ellen Foott, but by no one else.

By indenture of bargain and sale, bearing date the second day of November, 1864, and made between James Beatty, of the City of Detroit, in the State of Michigan, Esquire, and Albert Prince, of the Town of Sandwich, in the county of Essex, and Province of Canada, barrister-at-law, trustees of Ellen Foott, wife of George Wade Foott, of the first part, George Wade Foott, of the second part, and Arthur S. Emery, of the City of London, in the county of Middlesex, and Province aforesaid, auctioneer, of the third part, after reciting that, whereas the said trustees were by their trust authorized and required to convey the thereunder mentioned lands in such manner as might be directed by the said George Wade Foott, who had directed the execution of said conveyance, which direction was testified by his signature thereto, the said parties of the first part, for the expressed consideration of \$1,000, granted the lands in question to the said party of the third part in fee simple.

The learned Judge reserved the case, and subsequently delivered the following judgment :

CAMERON, J.—I am of opinion the plaintiff is entitled to recover possession of the land in question. Assuming it to have been held by the trustees of the plaintiff, Beatty and Prince, under the patent from the Crown of March 26th, 1857, upon the same trusts as the east half of lot No. 16, in the front concession of Dover East, for a deficiency in which the land in question was given or granted by the Crown as compensation, there would be no question of the plaintiff's right to recover unless she deprived herself of that right by the declaration signed and sealed by her and James Black Perrier of June 4th, 1857, by which she disclaimed any interest in the land, and authorized the trustees to convey in such manner as her husband, the late George Wade Foott, should direct and appoint, or by subsequent acquiescence in the conveyance by the trustees by the direction of her husband to Arthur S. Emery, his heirs and assigns, under whom the defendants claim.

I think there can be no doubt, having reference to the

papers and documents presented to the Crown Land department upon which the grant by way of compensation was made to Beatty and Prince of the land in question, it was intended to be subject to the trusts of the trust deed of January 15th, 1852, from James Black Perrier to the said Beatty and Prince. The order in Council authorizing compensation to be made contains this statement: "The present application is put forward on behalf of William Lumley Perrier and Anthony Perrier, trustees for Mrs. Foott, as to the west half, and James Beatty and Albert Prince, trustees as to the east half of lot 16 in 1st concession of Dover east. The Honourable the Attorney-General for Upper Canada is of opinion that compensation can be safely made to those trustees, and moreover that Mr. Foott himself might have personally claimed such compensation. A letter from the Commissioner of Crown Lands under date October 18th, 1856, addressed to agents for the disposal of public lands generally, giving effect to the order in council, was in the following terms: "Sir,—An order in council having issued on September 15th last, authorizing a grant to William Lumley Perrier and Anthony Perrier, and to James Beatty and Albert Prince, trustees for Mrs. Ellen Foott, in compensation for deficiency in the grant of lot 16, in the front or first concession upon the Thames, in Dover East, I have to request that you will allow a selection of the amount of £735 to be made by the *agent for the parties*, George Wade Foott, Esquire, from the Crown lands placed under your charge for sale."

These documents would seem to leave no reasonable doubt that the Government made the grant in compensation to Beatty and Prince solely in their character of trustees for the plaintiff, and the land acquired under the grant must be regarded in the same light as it would have been had the trustees under a power of sale sold the quantity of land found to be deficient and bought other lands with the proceeds, which clearly would have been subject to the trusts in the original deed of trust as far as they could be made applicable. The ground of contention,

therefore, put forward on behalf of the defendants, that there being no trust declared in the patent, the trustees took a fee simple in the land, unfettered by the trusts of the previous trust deed, is not entitled to prevail.

The next question is, has the plaintiff, by her declaration of the 4th of June, 1857, estopped herself from now setting up her title to the land as against the purchaser from her trustees and those claiming under him. It does not appear whether the purchaser, Arthur S. Emery, was, in fact, aware of this declaration, and was induced to buy by reason thereof. The paper seems to have been executed to enable George Wade Foott to obtain the balance of compensation due in respect of the deficiency in lot No. 16 in the 1st concession of Dover east rather than as being intended to affect the land in the patent already granted and now in question. I gather this from the language used in the recital, and also in the declaratory part of the declaration, which does not, in terms, cover land granted, though if a grant had not, in fact, been made, it would have extended to all the land covered by the order in council. The recital is as follows: "And whereas certain lands have been ordered by the Government of Canada to be granted to the said parties of the third part (Beatty and Prince) as such trustees, as a compensation for a certain deficiency in the quantity of the said eastern half of said lot 16, but the said parties have no real interest therein either as such trustees or otherwise, they having been named as grantees of such compensation merely from their being the present owners of the said east half of lot 16." Of course it is quite possible that Mr. Perrier, who lived in Ireland, might not, at the date of this declaration, have been aware that a patent had issued to Beatty and Prince on the 26th March preceding, and as far as he was concerned intended to relieve all lands that had been or might be obtained as compensation for the deficiency in lot 16, in the 1st concession of Dover East, from the trusts created by him in respect of that lot.

But, however this may be, it is clear the declaration is

not in any sense a legal conveyance of any land, and the plaintiff cannot be held to have divested herself of the title she had acquired to the land in dispute by it, and I do not see on the facts in evidence any that can in law or equity estop her from setting up that title against the defendants. In *Hope v. Beard*, 8 Gr. 380, Vice-Chancellor Esten, at page 384, uses the following language, which is applicable to the circumstances of the present case. "It appears to me that the release of 1851 is wholly inoperative as regards Mrs. Hope.

It may be, although I think not, that a married woman consenting to a breach of trust cannot afterwards complain of it, or making a representation, and encouraging another to act upon it, will be compelled to make it good; but it is perfectly certain, I apprehend, that she can perform no act of alienation in respect of such estate, unless it be accompanied by the solemnities prescribed by law for her protection. The requirement of the re-lease of 1851 from Mrs. Hope presupposed that the park lots were her property, and if they were she could not alienate them without the solemnities required by law. That they were her property is undoubted; a contract existed which had not been rescinded by the hospital. It was the duty of Mr. Beatty, as executor, to carry this contract into effect for her benefit, and he could not be permitted either to fulfil this contract, or to enter into another for her own benefit without her consent; and such consent, which would be in fact an alienation of her estate, could not be given so as to bind her without observing the solemnities required by law for the protection of married women." The trustees in the present case took a declaration to themselves from a married woman in favor of her husband contrary to the terms of the patent under which they held the land, assuming the declaration does extend to that land, and acted upon it so as to divest her of her interest in the land contrary to and in violation of the original trust, and the observances required by law to enable a married woman to divest her estate in land were not regarded. I think,

therefore, the declaration cannot be held either as a conveyance or an estoppel to defeat her legal and equitable title to the land in dispute. The declaration cannot be treated as an appointment under the trust deed because it took all the effect it could have immediately, and the power in the trust deed is a power of appointment to take effect upon the death of the *cestui que trust*, and moreover it was not executed in the presence of two witnesses as the power requires. I do not think it is open to these defendants, as was contended by Mr. Atkinson, to set up that the deed of trust executed by James Black Perrier was not in accordance with the provisions in the will of Sir Anthony Perrier. The trusts of the deed were assented to by the plaintiff, and except that they restrain a disposal of the property by the plaintiff in his lifetime, are in accordance with that will, and this qualification could only be questioned by the legal representatives of Sir Anthony Perrier, or by the plaintiff herself.

The evidence fails to shew that the plaintiff had any knowledge or notice of the conveyance to Emery previous to her husband's death, and without knowledge there could not be such an acquiescence in the breach of trust committed by the trustees as to prevent her now disputing the validity of the conveyance. None of the authorities referred to by Mr. Atkinson go that length,

The registry laws do not appear to me to be involved in the questions to be decided. There is no question of priority of conveyance. The original trust deed does not in terms relate to the land in question, and could not be registered as affecting it. The patent grants the land to Beatty and Prince, describing them as trustees, which I think must be taken as direct notice to the purchaser from them of their fiduciary character, and consequently the trusts are obligatory upon the purchaser and those who claim under him. There is no doubt, however, while this must be held to be the legal result, as matter of fact the purchaser believed he was acquiring a title to the land unfettered by any trust, and I am therefore of opinion he

is within the protection of the 4th section of chapter 95 R. S. O., in respect of any lasting improvements made by them on the land, and it must be, as was arranged by the parties, referred to the Master at Chatham to ascertain and report upon the value of such improvements, if any there be.

June 7th 1883. *S. H. Blake*, Q. C., and *Atkinson* moved to set aside the judgment, and to enter judgment for the defendants on the following, amongst other grounds : (1) On the law and evidence (2) On the weight of evidence. (3) That the defendants were in fact the grantees under Mrs. Foott, her protector, Perrier, and her trustees, by virtue of the deed of renunciation of June 4th, 1857, and the deed executed conveying the lands in question to Arthur S. Emery, through whom the defendants derived title. (4) That the clause against anticipation in the trust deed from J. B. Perrier to Beatty was not warranted by the terms of the will, and that the defendants were entitled to have the trusts expressed in the said will carried out without regard to the said clause against anticipation, the defendants being the holders of the legal estate by virtue of the deed of renunciation above referred to, and the power to have the said lands given to the trustees and Foott, and by their deed to Emery. (5) That Mrs. Foott having power to convey and renounce with the consent of her protector, and having renounced and conveyed with his consent, she could not afterwards claim the estate. (6) That the defendants established their title by length of possession. (7) That the plaintiff was estopped by her conduct and those through whom she claimed title from asserting any title to the lands in question. (8) That the plaintiff and those through whom she derived title acquiesced in the conveyance under which the defendants derived title, and in the possession and acts of ownership of the defendants and those through whom the defendants derived title.

Robinson, Q. C., and *Douglas*, contra.

November 23, 1883. HAGARTY, C. J.—The deed of 15th January, 1852, after shortly noticing the directions of the will of the plaintiff's father, declares that she had in writing requested J. B. Perrier, the then owner of the land, to convey the same in trust for her sole use and benefit. It then declares that for the purpose of carrying out the intentions of her father's will, and to vest the land in trustees for the use and for the benefit of the plaintiff during her life, and for the benefit of her children after her death, the land is conveyed to the trustees in trust to permit the plaintiff to occupy the premises, or to recover and take the rents, &c., for life, without impeachment of waste, and after death upon trust for such purposes, &c., as she should by deed or by her will appoint, and in default of appointment to her right heirs; no part of the land to be liable to her husband's debts, contracts, or engagements, but shall be for her sole and separate use, and to be upon this express condition, that the plaintiff should not sell, &c., or in any way affect, charge, encumber, or prejudice the said land so assigned for her sole use and benefit, or do or suffer, &c., any act, &c., which might in any way tend to reduce or diminish the annual profits to arise therefrom, or which might have the effect of preventing her during her life from being in the actual possession, &c., of the yearly rents upon her own sole and separate receipt, notwithstanding coverture; on violation of the condition without the grantor's written assent, the estate to revert to and vest in the grantor, his heirs, &c.

On 26th March, 1857, the grant was made to Beatty and Prince, "trustees of Ellen Foott, wife of George F. Foott, in compensation for deficiency in the east half of 16, front concession, Dover East," granting to them in fee No. 4, 10th concession, and the north-west half and east half of 4, 12th concession, Chatham.

The effect of this grant, it is contended, placed these compensation lands under precisely the same trusts as created by the deed of January, 1852.

This grant was obtained after much correspondence. On

12th September, 1856, a committee of council reported that G. W. Foott had applied for compensation for deficiency in the lot in Dover East, and that the application was put forward in behalf of Beatty and Prince, trustees of Mrs. Foott as to the east half, of other trustees for her as to the west half: that the Attorney-General had reported that compensation could be safely made to those trustees, or that Foott himself might have personally claimed it. They recommend that land be granted as an equivalent for the deficiency.

On 15th September an Order-in-Council issued to make the grants to the trustees.

Foott had sent in a power of attorney, dated 12th January, 1856, from Beatty and Prince, appointing Foott their attorney, in their names to demand and receive any compensation the Government might grant them in money or otherwise, in respect of the deficiency. Nothing is said in this of their being trustees.

On 14th February, 1857, Foott writes to the Commissioner of Crown Lands asking that the patents may issue.

Foott was aware of the opinion that compensation might be either to the trustees or to him personally. His letter of 13th March, 1857, shews this, and he again asks to have patents issued to the trustees of Mrs. Foott.

The patent did in fact issue, dated 26th March, 1857.

On 20th April, 1857, the Commissioner of Crown Lands writes to the Attorney-General stating its issue, and asking his opinion as to a proposition made to accept a surrender of the patent and to issue a new one to Mr. Foott.

Next day the Attorney-General writes that this proposition for the surrender of the patent by the trustees, and a new one to issue to Foott, could with propriety be entertained.

We next find a deed, dated 4th June, 1857, purporting to be made between J. B. Perrier (the settlor), Mrs. Foott, the plaintiff, and Prince and Beatty. It recites the trust deed of 15th January, 1852, and that certain lands had been granted by Government to the

trustees as compensation for deficiency in quantity, but that the trustees have no real interest therein, either as such trustees or otherwise, they having been named as grantees of such compensation merely from their being the present owners of the original lot, and that Foott was the beneficial grantee of such compensation as the original owner of the lot, and that they desired to declare that the said trustees are the nominal and not the beneficial owners of the compensation land.

Then Perrier and Mrs. Foott, the plaintiff, declare that they are not, nor is either of them, in any way interested in the compensation lands, and that Prince and Beatty hold them only as trustees or attorneys for Foott, and are to dispose of them as Foott may under his hand and seal appoint.

A deed is put in of the 11th February, 1861, signed by Prince and Beatty, declaring that they claim no interest in the lands, and that they belonged to Foott, and assign all interest therein or to the compensation to Foott.

It appears that besides these lands Foott had claimed and received a quantity of scrip as further compensation, and it would seem that this deed of 1861 was sent to the land office to support his claim. This scrip was not sent to him till 15th March, 1861.

On the 2nd November, 1864, the deed to Emery is made, Prince and Beatty describing themselves as trustees of Mrs. Ellen Foott, and that by this trust they are authorized and required to convey by Foott's appointment. He executes the deed. This deed was registered 26th December, 1865. Foott died in 1881.

The case is presented to us singularly bare of all evidence except the deeds and the records of the Crown Lands Department.

Mrs. Foott did not appear as a witness, nor did the defendant attempt to procure her attendance or examine her before trial. We may assume I suppose that she lived with her husband to his death. She must have been familiar with the origin and history of this trust created in her favour so many years ago.

This half lot was conveyed by her husband to her brother in Ireland as far back as 1837. Her father, in providing by will for his family, directs or requests the brother, in consideration of certain Irish property, to convey this half lot to or in trust for his daughter, free from her husband's contract debts, &c. This the son does by the deed of January, 1852, and the land is conveyed to her separate use.

We do not hear of this question of compensation until four years after. The application is made by the husband as the original grantee of the lot. Had the Crown granted the compensation lands to him, I do not think, on any evidence before us, any claim could have been substantiated to have them declared subject to the trust for Mrs. Foott, or that her husband could have been compelled to assign them to the trustees for her. We have no evidence on which we could say whether the original grantee or his vendee for value should be equitably entitled to the compensation allowed by the Crown.

A man may hold land deficient in the specified acreage. He sells it, the deficiency being known or unknown. If the former he obtains a less price, and compensation should properly be to him. A different state of things might make it more just that the vendee should be compensated. Now here the Crown, having been so advised by the Attorney-General, seem to have been willing to grant the compensation either to the vendor or vendee. It was unquestionably Foott's own application, not the application of the trustees. He produced the authority from Prince and Beatty to demand and receive the compensation, and to act for and use their names, not referring to any trust. The trust deed to them was on record. On the papers in evidence it is clear that Foott was willing to have the grant made to them as trustees. (Letter of March 13, 1857.)

Within about three weeks after the date of the grant application appears to have been made that the grant should be to Foott personally, and the Attorney-General next day gives his opinion that the patent might be sur-

rendered by the trustees, and a new one granted to Foott instead. Instead of taking this course they procure very soon after the execution of the deed of 4th June, 1857, from J. B. Perrier and Mrs. Foott, repudiating any right to these compensation lands.

Thus we find Perrier, the vendee of Foott and the creator of the trust, disclaiming all interest in the claim for compensation either to lands or money. The plaintiff joins in this deed. Perrier had never created any trust except as to the original half lot, and as far as in him lay formally denies all claim to the compensation lands.

Besides these lands a large amount of land scrip was after all these transactions granted to Foott personally, in order to fully satisfy his claim for the original deficiency, thus recognizing his right to receive it beneficially.

The plaintiff, having under the express trust no interest in any land except the original lot, must rest her claim on the effect of the Crown grant. If the Crown had granted to Foott personally, she could only have sought to make the new lands charged in her favour by a proceeding by her and her trustees, or, if they declined to act, by a suit against her husband, making them parties. I hardly see how she could have succeeded in this when the original vendee and settlor disclaimed all interest in or right thereto.

On the face of the grant no trust whatever is declared as to these lands. The grantees are described as trustees of Ellen Foott, wife of G. W. Foott, and the lands are described as being in compensation for deficiency in the Dover lot. The grant is to them personally in fee, not as trustees. Had she brought ejectment under our old system she would have been defeated by proof of the conveyance in 1864 by the trustees to Emery passing the legal estate, and she would have been left to her equitable remedy. In effect she now takes this course, but under great disadvantages for a correct adjustment of the rights of all parties. The trustees would have been parties, as chargeable with a breach of trust. In this suit she alone appears to claim the land from the defendants.

It is curious that no answer whatever is made by her in the record to the defence setting up her deed of June, 1857. Not even issue is taken on the statement of defence. In her claim she states that her trustees accepted the grant of the compensation lands "on the terms of said trusts."

The evidence contradicts this assertion, as they accepted and acted on the deed of repudiation of June, 1857.

I infer from the meagre evidence before us that all the parties contemplated that the compensation was to go to Foott beneficially. It may be urged that, even so, Foott, by obtaining the patent to his wife's trustees, made in effect a new settlement upon her of these lands. But I cannot believe that such was the general intention. I think he acquiesced in its issue in that form with the view, promptly acted upon, of getting the lands beneficially revested in himself by the action of the trustees.

I repeat, that Mrs. Foott's right or equity to having these lands included in the original trust would properly depend on the true relation existing between her husband and her brother, the vendor and vendee of the east half of the Dover lot. The best evidence that we have of their true relation is by Perrier's, the vendee's deed, emphatically declaring that he had no interest in, or claim to, any such compensation. If he had no such claim, there is no equity on her part to insist on their falling under her trust deed of 1852.

If I be right in assuming that the patent merely issued in its present form because the trustees appeared as the registered owners of the Dover lot, and if for the argument sake I assume that by its operation it clothed the new lands with the original trust, I have to consider the effect of the deed she executed in conjunction with her brother. Under the trust deed she could appoint by deed or will the disposition of the estate after her death. It was to be her separate estate, and she was prohibited from changing or anticipating, and her violation of this condition without the grantor or settler's written consent worked a forfeiture, and the estate reverted to him.

Apart from the clauses against anticipation, and merely

Looking at it as separate estate, she could dispose of it as if she were *feme sole*. See such cases as *Taylor v. Meads*, 34 L. J. N. S. Chy. 203, and the principles there so vigorously enunciated in Lord Westbury's judgment; *Pride v. Bubb*, L. R. 7 Chy. 64, and the very late and instructive case of *Cahill v. Cahill*, in the House of Lords, reversing the judgment of the Irish Court of Appeal, L. R. 8 App. Cas. 429.

The only instrument executed by her was in conjunction with her brother, the settlor, and of course with his full assent.

It can of course be urged that if the new lands came under the trusts of the deed, she could only deal with them in strict accordance with its terms, and any alienation or charging of the rents and profits would be against the anticipation clauses. Then what is the effect, if any, of her execution of this deed of June, 1857, not executed with the formalities required by the then existing law to be found in the act as to assurances of estates tail (or the Fines and Recoveries Act) of 1846, repeated in U. C. Con. Stat. ch. 83, sec 41-2-3-4? It is a deed in substance amounting to a repudiation of any beneficial interest in the new lands, and denying their being covered by the trust.

I am not prepared, without further argument, to decide that this deed had no binding effect on her so far as it shews her acquiescence in the declaration by her brother that he had no interest in or right to this compensation. See the strong remarks of Turner, L. J., in *Derbyshire v. Holme*, 3 DeG. M. & G. 113, and Mr. Lewin's remarks thereon: *Lewin on Trusts*, 7th Ed., 789.

Can she be forced to accept this property against her declared will? She never did any act to shew that she accepted or claimed any interest from 1857 to 1883, a period of 26 years. If she had already property held in trust for her, and other property is conveyed to the same trusts, and she for good reason declines to accept it, can she with the assent of her existing trustees execute a binding instrument expressly refusing the additional property?

Must the effect attributed to the anticipation clauses necessarily prevent such a repudiation by the plaintiff from having any effect? Lord Westbury, after declaring that she is *sui juris* as to her separate estate, says: "The right of the *feme covert* to dispose of her separate estate was recognized and admitted from the beginning until Lord Thurlow devised the clause against anticipation."

It was argued for defendant that the plaintiff should be bound by her deed from asserting an interest in these lands, and that it was such a fraud on her part now to claim them. Some of the cases on this subject may be referred to: *Sharpe v. Foy*, L. R. 4 Chy. 35; *Vaughan v. Vanderstegen*, 2 Drew. 40; *Hobday v. Peters*, 28 Beav. 349; *Jackson v. Hobhouse et al.* 2 Mer. 483.

The cases seem clearly to shew that she may be estopped by her fraud as to her separate estate; but it would seem that even positive fraud cannot defeat the clauses against anticipation. See *Clive v. Carew*, 1 J. & H. 199. per Wood, V. C.; *Arnold v. Woodhams*, L. R. 16 Eq. 29; *Stanley v. Stanley*, L. R. 7 Chy. D. 859; *Lewin*, 7th ed. 666-789.

It must not be forgotten that she is here not anticipating any portion of her separate estate, but merely joining with the original settlor in declaring what he could best declare and decide, that these lands formed no part of the trust estate.

If we have to decide the case on the question of fraud on the plaintiff's part, some more evidence might be desirable.

We might desire to know what was her knowledge of the true state of the case. Was she not aware that her husband was claiming this compensation in lands and money for himself, and that the compensation was, in fact, received and enjoyed by him for his own benefit, and were not these lands sold by him in 1864?

On the evidence before us, I prefer to rest my decision upon this, that the plaintiff, in the face of the conveyance by her trustees of the legal estate to defendants, is compelled to rest on her right to enforce her equity against such a

disposition of what she claims as part of the trust estate—**that** the grant to them does not in terms declare any trust, **and** that she has to claim from the Court the declaration **that** on the facts shewn by her in evidence these lands are **property** bound by the trusts in the original trust deed.

My conclusions of fact from the evidence are:

1. That the vendee of the lot, J. B. Perrier, was not **entitled** to and never claimed compensation for deficiency **in the acreage.**

2. That such compensation was properly claimed by **Foott**, the original purchaser, for himself.

3. That the application was made by him, and the **names** of the trustees only used, as they were the registered **owners** of the lot.

4. That it was the intention of all the parties that the **compensation** belonged to and should be given to him **beneficially.**

5. That the plaintiff knew of and approved of this, and **that** neither she nor her trustees had any intention to claim **it** **for** the trust.

6. That the Government was equally willing to grant it **either** to Foott or the trustees, and would have accepted a **sur-**render of the grant, and made a new grant to Foott if **desired.**

7. That instead of taking this latter course all the parties **agreed** to the deed of June, 1857, to shew the real transac-
tion, and to place the compensation in Foott's control **beneficially.**

8. That Foott had no intention of making any new **set-**tlement of the compensation in favour of the plaintiff.

9. That with the assent of all parties he received the **money** or scrip afterwards given to complete the compen-
sation from the Crown to his own use.

10. That the defendants are purchasers for value from **the** trustees holding the legal estate, with no further **notice** than what is stated on the face of the deed to them, **which** states that Mrs. Foott's trustees had the right to **convey** as Foott should appoint.

On the whole case I am of opinion that as the legal estate passed, and as the plaintiff cannot recover without our aid, as a Court of Equity, to declare her rights, that she has not made out a case for our intervention, and that her action should be dismissed.

I need hardly say that I do not profess to be very familiar with the practice of Courts of Equity, but I feel a great difficulty in a case like the present in not having the trustees before us as parties, when a breach of trust is charged and relief sought therefor, and I can hardly think that relief would be accorded to this plaintiff on the record as now framed and on the extremely meagre and defective evidence that she has adduced.

My learned brothers, I believe, are of opinion that as the deed which she executed was not acknowledged as required by law she must recover. I am unable to dispose of this case on this intelligible *formula*, as I look on her position in a different light.

I think her claim is not properly made out, and that it must be dismissed, with costs, without prejudice to any future proceeding she may be advised to take.

ARMOUR, J.—The provision as to compensation to be made by the Crown for deficiency in lands granted, sold, or appropriated by the Crown, first appears in 4 & 5 Vic. (1841) ch. 100, sec. 28, and is as follows: "And be it enacted that * * in all cases wherein by reason of false survey, the land supposed to be conceded shall be found wanting in the whole or in part, it shall and may be lawful for the Governor of this Province in Council to decree and order a new grant equal in extent, or equivalent to the land lost, according to the discretion of the said Governor-in-Council. Provided always that no such claim on account of any error in survey shall be entertained or granted, unless the land found wanting shall be equal to one-fifth of the whole quantity described to be contained in the particular lot or parcel of land granted or conceded; and provided also that no such claim for indemnity shall be

entertained after the space of five years from the issue of the letters patent granting or conceding such lot or parcel of land, or shall extend to cover the value of any improvements made by the grantees in error or mistake under any such grant."

This Act 4 & 5 Vic. ch. 100, remained in force until the 14th of June, 1853, when it was repealed by the Act 16 Vic. ch. 159, sec. 20 of which provided that "in all cases wherein by reason of false survey any grant, sale, or appropriation of land has been or may be found to be deficient, the Governor-in-Council may order a free grant equal in value to the ascertained deficiency; provided always that no such claim shall be entertained, unless application was or shall be made within five years from the discovery of such deficiency, nor unless the deficiency is equal to one-tenth of the whole quantity described to be contained in the particular lot or parcel of land granted."

It was under this clause of the last mentioned Act that the land was granted, which is the subject of this suit.

Under the deed of 15th January, 1852, the plaintiff became entitled to an estate for life in the said land, with a power of appointment, and this estate was her separate estate, and she could but for the provision therein against anticipation have disposed of the same during her coverture in all respects as if she had been sole and unmarried.

It was argued, however, that the provision against anticipation should not have been inserted in the deed, and ought not to be allowed to be a restraint upon her alienation of her estate, because it was not provided by the will of Sir Anthony Perrier that the conveyance of the said land to be executed by the said James Black Perrier in trust for the plaintiff should contain such a provision. It was however a proper and usual provision to be inserted in such a conveyance, and the conveyance was by the said will to be such conveyance as he the said James Black Perrier might be called upon or required by the plaintiff to execute, and she did call upon and require him to execute this conveyance containing this provision, and I do not see

how either she or these defendants could under the facts in evidence urge that this deed should be reformed in this regard.

Now, who was entitled to be compensated in respect of the deficiency in the the east half of lot 16 in the 1st concession of Dover East ? This partly depends upon when it was discovered that there was such deficiency; and in order to ascertain this with accuracy I called for the petition mentioned in the order in council, but it has not been produced. But I think that it may be safely inferred that it was first discovered after the execution of the deed of the 15th of January, 1852 ; for had it been discovered before that date, or even for some time after, it could not have been said, as was said in the petition, to have been "recently discovered." Assuming this to be so, then we have the fact that George Wade Foott conveyed the east half of lot 16 to James Black Perrier for a valuable consideration. and as if it contained its full complement of land; and we have the further fact that James Black Perrier conveyed it to Beatty and Prince, as trustees, for a valuable consideration, and as if it contained its full complement of land. Then, how could it be said that either George Wade Foott or James Black Perrier was entitled to compensation for the deficiency when each had conveyed for valuable consideration such deficiency ? Was compensation to be made to either of them when neither had suffered any loss, or was compensation to be made under the Act to those who had suffered the loss ? Those who had suffered the loss were clearly the trustees, and those for whom they were trustees, for it turned out that they instead of having an hundred acres of land, as they were entitled to have under the circumstances which had happened, had only sixty acres. The trustees were the only persons to whom the Government could have properly granted compensation, and if the compensation had been granted by the government to any one else the trustees could in my opinion under the circumstances have successfully maintained a bill in equity to have it declared that such donee or grantee held such

compensation as a trustee under the terms of the deed of January 15th, 1852, and to compel a delivery or conveyance to them of such compensation.

In equity the compensation to be made for the deficiency would stand in the place of the deficiency, and would be subject to the same trusts as that would have been, had it existed, in the place of which it was substituted. I can understand the opinion of the Attorney-General given in this view, "There is no remedy against the Crown for its wrongdoing. You can, therefore, give the compensation to whom you please; the Crown cannot suffer by it, for those rightly entitled can have no remedy against the Crown." But had a remedy at that time existed against the Crown as against an individual, the Attorney-General would have given no such advice to the Crown, and if he had it would have been erroneous. Suppose it had happened that the east half of lot 16 had been wholly deficient, can it be doubted to whom the compensation would have belonged? Could George Wade Foott have rightfully obtained it when he had long before sold the land and been paid for it as if it was in no wise deficient? And what difference can it make that it was deficient only in part? The Crown, however, did grant the compensation to the trustees so far as the patent from the Crown to them of the lands therein contained represents such compensation, and rightly so in my opinion; and that the trustees at that time, whatever view it might afterwards have become convenient for them to hold, were of opinion that they were entitled to the compensation is manifest from their power of attorney to George Wade Foott to act for them in obtaining it.

Upon the grant being made to Beatty and Prince of the land in question in this suit, they held the same as trustees upon the same trusts to all intents and purposes as they held the east half of lot 16, and they could not divert the land so granted, nor could they free themselves from these trusts.

Apart altogether from the fact that they are described

in the grant as trustees, and assuming that the grant had been to them without any description whatever of their representative capacity as trustees, they were and would have been deemed in equity to have been trustees of the land granted upon the trusts contained in the deed of January 15, 1852, for they obtained the grant through the medium of that trust.

Now what was the effect of the instrument of 4th June, 1857, upon the lands granted to and held by the trustees under the trust contained in the deed of January 15th, 1852? It had no effect whatever upon them. James Black Perrier had no interest whatever in them, and Ellen Foott had no power whatever over them, except a power of appointment of the remainder. It was at best but a mere declaration of the opinion of James Black Perrier and Ellen Foott as to the legal position the trustees occupied with respect to the land ordered to be granted, and of their legal right to dispose of them, and it had no more effect upon these lands than it would have had upon the east half of lot 16, if they had declared that the deed of January 15th, 1852, created no trust in favour of Ellen Foott, but only in favour of George Wade Foott, and that the trustees were to dispose of that land as he might appoint.

Emery must be held to have had notice of the title of the trustees. The patent from the Crown described them and this was a description of the character in which they took the lands, as "trustees of Ellen Foott, wife of George Wade Foott, in compensation for deficiency in the east half of lot number 16, in the front concession, on the 'Thames, of the township of Dover East.'" This was full notice to Emery that their title was that of trustees, and called upon him to see the instrument creating the trust. Then the deed to him described them as trustees of Ellen Foott, wife of George Wade Foott, and stated by way of recital that the said trustees were by their trust authorized and required to convey the lands in such manner as might be directed by the said George Wade Foott. This was

also notice to Emery of the instrument said to authorize them to convey to him; indeed the main argument of the defendant's counsel was based upon the fact that Emery had notice of the declaration of June 4th, 1857. If he had notice of it, and he would be presumed to have had notice of it, he must also have had notice of the deed of January 15th, 1852, and of all the other facts recited in it. He must therefore be considered as having purchased the lands in question with full knowledge of the deed of January 15th, 1852, and of the declaration of June 4th, 1857, and of all the facts recited in them; and having this knowledge, if he drew a wrong conclusion, or was wrongly advised that the trustees had power to convey to him, he would have to suffer the loss.

"And generally it may be stated, as a rule on this subject, that where a purchaser cannot make out a title but by a deed which leads him to another fact he shall be presumed to have knowledge of that fact. So the purchaser is in like manner supposed to have knowledge of the instrument under which the party with whom he contracts as executor or trustee, or appointee, derives his power:" *Story's Eq. Jur. sec. 400.*

There is no room for asserting that there was any estoppel, for Emery had the same knowledge and means of knowledge as the plaintiff, and there is no evidence of any fraud on her part: the fraud, if any, was theirs, by whom she was induced to sign the declaration of June 4th, 1857.

The defendants claim under Emery, and occupy no better position than he did.

I think, therefore, that the plaintiff is entitled to the possession of the lands in question: that she is entitled to have it declared that the defendants hold the said lands subject to the trusts contained in the deed of January 15th, 1852, and to have it ordered that they shall convey the said lands to trustees to be named by her, free from any act done by them, by such a conveyance as the Master at Chatham shall direct, in case the parties disagree as to it.

I do not think that the Act R. S. O. ch. 95, sec. 4, is

applicable to a case of this kind, but that the rights of the parties as to taxes paid, permanent improvements made, and rents and profits received, must be determined according to the principles of equity governing the relationship of trustee and *cestui que trust*.

I think, therefore, that it ought to be referred to the Master at Chatham to enquire and state what taxes have been paid in respect of the lands in question since the date of the deed to Emery, by whom the same have been paid and when they were paid, and for what purpose they were levied; what permanent improvements have been made upon the said land since the date of the said deed; by whom the same were made, and when the same were made, and the value of them respectively; what rents and profits or annual value of the said lands have been received since the said date; by whom the same have been received, and when the same were received; and that further directions and costs ought to be reserved until after the said Master shall have made his report.

CAMERON, J., adhered to the judgment delivered by him after the trial.

[QUEEN'S BENCH DIVISION.]

REGINA V. WALLACE.

Canada Temperance Act, 1878—Conviction—Certiorari—Prior conviction.

Held, CAMERON, J., dissenting, that sec. 161 of the Canada Temperance Act, 1878, 41 Vic. ch. 16 D., taking away the right to *certiorari*, applies to convictions for all offences against the preceding sections of the Act, and does not relate merely to offences against sec. 110.

Per HAGARTY, C. J., and ARMOUR, J. An erroneous finding on the evidence by the magistrate, which was all that was shewn here, is not such a want of jurisdiction as warrants the issue of a *certiorari*, and

Per CAMERON, J. There was on the facts set out below no evidence of the commission of the offence charged in this case, and therefore the magistrate acted without jurisdiction, and a *certiorari* would lie.

Per ARMOUR, J. The omission of the magistrate to ask the accused whether he had been previously convicted did not deprive him of jurisdiction to receive proof of the prior conviction.

The allegation in the conviction that the offence was committed between the 30th June, and the 31st July, was held a sufficiently certain statement of the time.

It appeared by the return to a writ of *certiorari* in this case that an unsworn information had been laid, on the 2nd day of August, 1883, by James A. Frazer, license inspector of the county of Halton, before William Hixon Young, police magistrate of the county of Halton, that he had just cause to suspect and believe that John Wallace, of the town of Milton, in the county of Halton, within the space of thirty days then last past, to wit, on or about the 30th day of July, at the town of Milton, in the county of Halton, did unlawfully sell intoxicating liquor in contravention of the second part of the Canada Temperance Act, 1878; and further, that the said John Wallace was previously, to wit, at the town of Milton, before W. H. Young, police magistrate in and for the county of Halton, on the 21st day of October, A. D. 1882, duly convicted of having, on the 11th day October, 1882, unlawfully sold intoxicating liquor in contravention of the Canada Temperance Act, 1878, James A. Frazer being informant; and further, that the offence thereinbefore firstly above charged against the said John Wallace was a second offence against the provisions of the second part of the said Canada

Temperance Act, 1878: that the defendant appeared to answer the said information on the 7th day of August, 1883: that evidence was then given that the Canada Temperance Act, 1878, was in force in the county of Halton: that a certificate was then filed, signed by W. H. Young, police magistrate, that John Wallace was duly convicted before him on the 21st day of October, 1882, at the town of Milton, for that he, the said John Wallace, did, on the 11th day of October last past, unlawfully sell intoxicating liquor in contravention of the Canada Temperance Act, 1878; and that evidence was given that the said John Wallace was the same John Wallace who had been previously convicted for an offence against the Canada Temperance Act, 1878.

It also appeared that the following evidence was given of the offence:

George Lavery said: "I know John Wallace, the defendant. I was in his hotel on the 30th day of July last. I might have had something to drink, but do not remember if I had any intoxicating liquor. I might not have had intoxicating liquor. Was not at the defendant's on the 30th of July with Long. I do not remember of having anything intoxicating in defendant's within thirty days last past: will not say I did not."

Charles Knees said: "I do not know if I was at defendant's hotel on Monday last: cannot say if I was there about that date. I never had any intoxicating liquor in the Wallace House, in Milton."

William H. MacNab: "I board at John Wallace's hotel: was likely there on the 30th day of July: will not swear that I had or that I had not intoxicating liquors to drink there on or about that date. The chances are that I did not have intoxicating drink on the 30th of July."

John Wallace, defendant, sworn: "I keep a public house in the town of Milton. I do not recollect of selling, on the 30th day of July last, any intoxicating liquor, or any mixed liquor part of which was intoxicating; nor do I know of any person or persons in my employ having done so; nor do I recollect of anything being sold about that date. Will not say there was none sold." Questioned by the Court to witness: "Did you, within thirty days last past before the date of this charge (viz., the 30th da

of July last) sell any intoxicating in your house or on your premises, known as the Wallace House, in the town of Milton?"

The following objections were thereupon raised by the defendant's counsel: That the defendant refused to answer the questions on the grounds—1st. That the prosecution had not made out a *prima facie* case against the defendant: 2nd. That the prosecution had not sufficiently established the infraction of the law complained of, so as to put the defendant on his defence, under section 121 of the Canada Temperance Act, 1878, and under the circumstances the prosecution was not entitled to call the defendant as a witness, under section 123 of said Act, to establish such infraction of the law: 3rd. That the defendant refused to answer the question on the ground that the answer might have a tendency to criminate him. The defendant thereupon answered that the answer of the foregoing question might criminate him, and that is the reason why he refused to give answer of yes or no to the question, and his only reason. The police magistrate thereupon made the following note: "The defendant offers no defence to the charge or to his previous conviction. The case for the prosecution is closed, and decision reserved until August the 14th, at Milton."

On the 14th day of August, 1883, at the town of Milton, in the county of Halton, the said John Wallace was convicted by the said police magistrate, for that he the said John Wallace did, between the 30th day of June and the 31st day of July, A.D. 1883, at the town of Milton, in the county of Halton, unlawfully sell intoxicating liquor in contravention of the Canada Temperance Act, 1878; and that it appearing to the said Police Magistrate that the said John Wallace was previously, to wit, on the 21st day of October, A.D. 1882, at the town of Milton, before him the said Police Magistrate in and for the said county of Halton, duly convicted of having on the 11th day of October, A.D. 1882, at the said town of Milton, unlawfully sold intoxicating liquor in contravention of the Canada

Temperance Act, 1878, he adjudged the offence of the said John Wallace to be his second offence against the provisions of the said Canada Temperance Act, 1878, James A. Frazer, License Inspector in and for the said county, being complainant, and he adjudged the said John Wallace for his said second offence to forfeit and pay the sum of one hundred dollars, to be paid and applied according to law, and also to forfeit and pay to the said James A. Frazer, complainant, the sum of eight dollars and forty-five cents (\$8.45) for his costs in that behalf; and he ordered that if the said several sums should not be paid on or before the 20th day of August, 1883, the same should be collected by levy and distress of the sale of the goods and chattels of the said John Wallace, and in default of sufficient distress being found to satisfy the same, and the costs attending the said distress, he adjudged the said John Wallace to be imprisoned in the common gaol of the said county for the space of two months, unless the said several sums and costs and charges of the said distress should be sooner paid.

On the 12th day of October, 1883, *Aylesworth*, on behalf of the said John Wallace, obtained an order *nisi*, upon reading the writ of *certiorari* and the return thereto, and the information, depositions, evidence, conviction, orders and proceedings returned therewith, and the affidavit of the said John Wallace, calling upon the said police magistrate, and the said license inspector, to shew cause why the said conviction should not be quashed, with costs to be paid by them, or either of them, upon the grounds, among others, that: (1) In making the said conviction the police magistrate acted without proof of any offence against the said Act having been committed, and therefore without jurisdiction. (2) There was no evidence given before the said magistrate to warrant the said conviction. (3) The substance of the information or complaint against the said John Wallace, upon which he was convicted as aforesaid, was never stated to him, and the magistrate therefore, in hearing the said evidence and making the said conviction—

was acting wholly without jurisdiction. (4) The said magistrate upon the hearing amended or altered the information upon which the said John Wallace was brought before him, and substituted for the offence charged therein another and different offence, of which he afterwards convicted the defendant, and such amendment, alteration or substitution was without authority, in that no variance had in any way appeared before the said magistrate between the original information and evidence adduced in support of it. (5) The evidence taken before the said police magistrate, upon the said charge, did not establish the charge made in the original information, or in the substituted information, nor any offence, and did not justify the said conviction. (6) After the said amendment, alteration or substitution was made in the said information, no evidence was given upon or in support of the said amended or substituted information to establish the offence charged therein, or any offence against the defendant at all. (7) No circumstances were shewn in evidence establishing any infraction of law to put the defendant on his defence under the provisions of the said Temperance Act. (8) Neither the said information, evidence or conviction stated or shewed with any or with any sufficient accuracy the time when the said alleged offence was charged to have been committed. (9) The said conviction assumed to convict the said John Wallace for a second offence against the provisions of the said Canada Temperance Act, but it did not appear that the said John Wallace, before being so convicted for the said alleged second offence, was at any time asked whether he was so previously convicted, and without such preliminary enquiry of the defendant the said magistrate had no jurisdiction to enquire otherwise concerning such previous conviction, and the evidence given before the said magistrate to prove such previous conviction was not admissible till such previous enquiry of the defendant had been had.

On the 26th day of November, A. D. 1883, *Aylesworth* supported the order *nisi*, and contended that there was no

evidence whatever, and therefore, whether the writ of *certiorari* were taken away or not in other cases under the Act, it could not be taken away in such case; and that the conviction was void as it should be limited to a day certain.

Delamere, contra, contended that there was evidence that the defendant having within his own knowledge the fact on which his conviction or acquittal depended, and being under the Canada Temperance Act a competent and compellable witness and refusing to answer, the presumption of guilt was properly decided against him. He cited *Taylor* on Evidence, 5th Ed., 131; *Clifton v. United States*, 4 Howard 242. He further argued that if there was any evidence *certiorari* would not lie, referring to Canada Temperance Act, sec. 111; *Ex parte Orr*, 4 S.C. New Brunswick Rep. 67; *Ex parte Hackett*, 21 New Brunswick 513; *Regina v. Bennett*, 1 O. R. 445; and that *Paley* on Convictions, 5th Ed., 190, was an authority for a conviction stated to be for an offence committed between a certain day and a certain other day being valid.

December 29, 1883. ARMOUR, J.—The principal ground taken against this conviction was, that there was no evidence or no sufficient evidence given in support of the charge made against the defendant, and it was argued that this being established it constituted such want of jurisdiction in the magistrate who made the conviction as to warrant the issue of a *certiorari*, even although it should be held to be taken away by the express words of the Act. But it was argued that *certiorari* is not by the terms of the 111th section of the Act taken away in the case of a prosecution such as this is under the 100th section of the Act because, as was contended, section 111 applies only to the case of a prosecution under the 110th section. But in my opinion this contention is untenable, and the 111th section applies to the case of a prosecution such as this is under the 100th section. The words "in any such case," in the 110th section, clearly refer to the case of a prosecution such as

this is under the 100th section; and I think that the words "in any such case," in the 111th section, refer equally clearly to the case of a prosecution such as this is under the 100th section.

The question therefore is, *certiorari* being expressly taken away, and the magistrate having proceeded regularly with the enquiry, and having heard witnesses in support of the charge, can there be said to be such want of jurisdiction as would warrant the issue of a *certiorari* because the magistrate erroneously found that there was sufficient evidence to support the charge, when he ought to have found that there was no evidence or no sufficient evidence to support it?

I do not think that it can be said that this erroneous finding by the magistrate was such a want of jurisdiction as would warrant the issue of a *certiorari*, and I think that so far as this ground is concerned the *certiorari* was issued improvidently, and ought to be quashed.

In *Regina v. Bolton*, 1 Q. B. 66, Lord Denman, C. J., in delivering the judgment of the Court, said:

"This was a return by two magistrates to a *certiorari* for the purpose of bringing into this Court proceedings had by them under Statute 59 Geo. III. ch. 12, sec. 24. In addition to these proceedings, the parties on each side brought before us affidavits disclosing on the part of the magistrates the evidence on which they acted; on the part of the defendant, as well the evidence on which he relied before them as other evidence affecting the merits, not adduced before them. Two points were made in support of the order; the first, that the proceedings all being regular on the face of them and disclosing a case within the jurisdiction of the magistrates, this Court could not look at affidavits for the purpose of impeaching their decision. * * The first of these is a point of much importance because of very general application, but the principle upon which it turns is very simple. The difficulty is always found in applying it. The case to be supposed is one like the present, in which the Legislature has trusted the original, it may be, (as here,) the final, jurisdiction on the merits to the magistrates below, in which this Court has no jurisdiction as to the merits, either

originally or on appeal. All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it. * * It will be observed, however, that here we receive affidavits, not to shew that the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry. In this sense, therefore, and for this purpose, it is true that affidavits are receivable. But where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the enquiry; in so doing he undoubtedly acts within his jurisdiction; but in the course of the inquiry, evidence being offered for or against the charge, the proper, or, it may be, the irresistible conclusion to be drawn may be that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now, to receive affidavits for the purpose of shewing this is clearly, in effect, to shew that the magistrate's decision was wrong if he affirms the charge, and not to shew that he acted without jurisdiction; for they would admit that in every stage of the inquiry up to the conclusion he could not but have proceeded, and that if he had come to a different conclusion his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature. It is determinable at the commencement, not at the conclusion of the inquiry; and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry. * * We forbear to express any opinion on that which is not before us, the propriety of the conclusion drawn from the evidence by the magistrates. They and they alone were the competent authority to draw it; and we must not constitute ourselves into a Court of Appeal, when the statute does not make us such, because it has constituted no other. It is of much more importance to hold the rule of law straight than, from a feeling of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases."

In *Ex parte Hopwood* and another, 15 Q. B. 121, which was an application for a *certiorari*, the parties having been convicted under the Factory Act 7 & 8 Vic. ch. 15, sec. 69 of which takes away *certiorari* in such cases, it was held that a conviction cannot in such cases be removed on the suggestion that the party was convicted on summons of justices under section 47, giving unreasonably short notice, and in the absence of himself or any one appearing on his behalf, except an attorney authorized only to apply for an adjournment, and that the conviction took place without proof of service of summons, and without any evidence of the facts charged, such objections not going to the jurisdiction.

Lord Campbell, C. J., said: "But the legal question arises on only two points. * * Secondly, whether we can take notice of the want of evidence. * * As to the second ground, I do not rely on the appearance of the attorney under a qualified authority, but will assume that he had no authority at all. Still the magistrates would have jurisdiction."

Patteson, J.: "As to the want of evidence on matter of fact, that cannot possibly take away jurisdiction: no case can be cited where that has ever been said."

Wightman, J.: "Then, as to the want of evidence. If the magistrates had any jurisdiction to proceed, we cannot ask whether they heard evidence at all, or whether the evidence they heard ought to have led them to an opposite conclusion."

See also *Regina v. St. Olave's Southwark*, 8 El. & Bl. 529; *Regina v. Grainger*, 46 U. C. R. 382.

In *The Colonial Bank of Australasia v. Willan*, L. R. 5 P. C. 417, the Judicial Committee said, p. 442:

"There are numerous cases in the books which establish that notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a *certiorari*. But some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either

of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it. * * And as these two points, want of jurisdiction in the Judge, and fraud in the party procuring the order, are essentially distinct, it will be well to consider them separately. In order to determine the first, it is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction.' There must of course be certain conditions on which the right of every tribunal of limited jurisdiction to execute that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject matter of the enquiry, or upon certain proceedings which have been made essential preliminaries to the enquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge, or on the nature of the subject matter, or on the absence of some essential preliminary, must obviously in most cases depend upon matters which, whether apparent upon the face of the proceedings or brought before the Superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject matter, he properly entered upon the enquiry, but miscarried in the course of it. The Superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to re-try a question which the Judge was competent to decide. Accordingly, the authorities, of which *Regina v. Bolton*, 1 Q. B. 66, and *Regina v. St. Olave*, 8 E. & B. 528, may be taken as examples, establish that an adjudication by a Judge having jurisdiction over the subject matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein, and that the Court of Queen's Bench will not, on *certiorari*, quash such an adjudication on the ground that any such fact, however essential, has been erroneously found."

This disposes of the 1st, 2nd, 5th, and 6th grounds taken in the rule.

The 3rd and 4th grounds are founded upon a mistake

of fact. The original information upon which the defendant was brought before the magistrate was never altered or amended, nor was any other information substituted therefor.

It is a sufficient answer to the 7th ground taken in the rule, that the magistrate did not in fact put the defendant on his defence under the terms of the 121st section of the Act, but called him as a witness under the provisions of the 123rd section.

The allegation in the conviction that the offence was committed between the 30th day of June and the 31st day of July, A. D. 1883, is a sufficiently certain statement of the time in a conviction: See *Puley on Convictions*. This disposes of the 8th ground.

As to the 9th ground. It does not appear that the defendant was not asked whether he was so previously convicted; and whether he was asked or not, it was proved that he was so previously convicted; and the omission to ask him whether he was so previously convicted, before proving that he was so, would not deprive the magistrate of jurisdiction to prove that fact without asking him at all.

Upon the whole, the order *nisi* should, in my opinion, be discharged with costs, and the *certiorari* should be quashed, and a *procedendo* should issue.

HAGARTY, C. J.—Section 111 of the Act 41 Vic. ch. 16, D., expressly takes away the *certiorari*, and when the decision, as here, is before a police magistrate, disallows any appeal to the Sessions, or other Court whatever, from any conviction, judgment, or order. I think it is clear that section 111 applies to all the offences previously set out in the Act, and not merely to the section 110 immediately preceding.

The words "in any such case" are also in the preceding section 110, which refers, I think, clearly to "any offence against the provisions of the second part of this Act" in the beginning of section 109.

Section 117 provides that no conviction shall be quashed by reason of any variance between information or conviction

tion, or by reason of any other defect in form or substance provided it can be understood that it was for an offence against some provision of the Act within the jurisdiction of the justices, &c., and provided there is evidence to prove such offence, and no greater penalty is imposed than is authorized by the Act.

This clause would seem to warrant an examination of the merits; but it is probably only intended where a conviction is substantially defective on its face to allow it to be supported by reference to the evidence proving the offence.

Section 118 provides that on motion to quash or discharge on *habeas corpus* the Court may dispose of it on the merits, and may amend; and in all cases where it appears that the merits have been tried, and that the conviction, &c., is sufficient and valid under this section, or otherwise, it shall be affirmed or not quashed, &c.

Section 120 enacts that in proving the sale or barter of liquor it shall not be necessary to shew that any money actually passed or any liquor was actually consumed, if the magistrate hearing the case is satisfied that a transaction in the nature of a sale or barter, or other unlawful disposal, actually took place.

Sec. 121 says it shall not be necessary that any witness should depose directly to the precise description of the liquor sold or bartered, or the precise consideration therefor, or to the fact of its taking place with his participation or personal and certain knowledge; but the magistrate, as soon as it appears to him that the circumstances in evidence sufficiently establish the infraction of law complained of, shall put the defendant on his defence, and, in default of his rebuttal of such evidence, shall convict him accordingly.

The *certiorari* is, I hold, to be taken away by this Act. It contains very stringent provisions, necessary, as the Legislature considered, for dealing with the difficult subject before them.

It is clear, however, that although so taken away, the Court has the right to see that the jurisdiction given to the magistrate has not been exceeded.

The Courts never claimed the right of enquiring whether the decision was right or wrong on the evidence, where there was evidence both ways; but they did use their own judgment where the conviction set out the evidence under the old practice, and they thought there was no evidence sufficient to convict, or where a case was stated for their opinion. Several examples of this are in our case of *Regina v. Howarth*, 33 U. C. R., 537.

By taking away the *certiorari* the Legislature apparently curtails, if not abolishes, this right of review. *Paley* (Ed. 1879) 430: "So even express words, taking away the *certiorari*, are inapplicable where there is a want or excess of jurisdiction, which may be shewn by affidavit, although the conviction may be good *ex facie*, or where the Court has been illegally constituted, or the conviction has been obtained by fraud, * * p. 431. Objections of this kind may be founded on the character and constitution of the inferior Court, the nature of the subject matter of the enquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior Court."

***Burn's Justice*, (Ed. 1869) p. 618: "And, generally, when thus taken away, the Court will not directly or indirectly in any manner enable a defendant to remove proceedings before it." See *Rex v. Eaton*, 2 T. R. 285; *Rex v. Justices of West Riding of Yorkshire*, 1 A. & E. 563.**

In the latter case the Court refused a *mandamus*, as it would be trying, by a side wind, to overhaul the proceedings, which they had no right to do. See Lord Denman's remarks. In *Regina v. Dickenson*, 7 E. & B. 837, see remarks of Judges.

In *Regina v. Chantrell*, L. R. 10 Q. B., see judgment of Field, J., (p. 589), reviewing the cases as to the power and practice of the Court. See also *Regina v. Bradlaugh*, L. R. 3 Q. B. Div. 511.

The Privy Council case, cited by my brother Armour, points out what we can do and cannot do with a conviction when the *certiorari* is taken away.

I may also refer to *Regina v. Justices of St. Albans*, 22 L. J. N. S. M. C. 142, shewing how far this Court will go if no jurisdiction. See also *Regina v. Deny*, 20 L. J. N. S. M. C. 189; *Regina v. Wood*, 5 E. & B. 49.

Some cases have occurred in our own Courts in which the merits appear to have been enquired into, though the *certiorari* was taken. But it does not appear that the point on which the present case turns was taken or disposed of. *Regina v. Bennett*, 1 O. R. 445, before my brother Cameron, noticed by him in *Regina v. Walsh*, 2 O. R. 242.

We do not decide here, nor is it necessary we should, that if a magistrate refuse to hear any evidence, or decide without hearing any evidence, that the general power of supervision in the Superior Courts may not be exercised; nor do we hold that any clear dereliction of duty or improper conduct on his part in the proceedings cannot be shewn as a ground for our interference.

But it appears to me that the Legislature clearly intended to bar our supervision of any decision of the stipendiary magistrate arrived at by him on the merits. If we take upon ourselves to say that the evidence in this case was insufficient to convict, we fall back on the law as it has always been applied in cases where the *certiorari* was not expressly taken away, and we completely defeat what appears to me to be the clear intention of the Legislature, and render the express denial of the *certiorari* an utterly idle and futile enactment. We have to see that the inferior tribunal acted strictly within the authority of the Act, duly heard the case, and gave its decision upon the evidence duly laid before him.

If we quash this conviction we can only do so on the ground that we consider his conviction on the evidence wrong. I think that Parliament has, in this case, enacted that we have no such right.

I refer to *Regina v. Johnson*, 30 U. C. R. 423; *Regina v. Leveque*, 30 U. C. R. 509; *In re Watts & Emery*, 5 P. R. 27, per Gwynne, J. As to sufficiency of evidence, *Burber v. Armstrong*, 6 O. S. 543.

CAMERON, J.—I am unable to agree in the opinions just pronounced, on the ground that there was no evidence whatever before the police magistrate of the commission by the defendant of the offence charged; and in the absence of any evidence in support of the charge, the magistrate acted wholly without jurisdiction. The offence is one within his jurisdiction, and he had undeniably a right to enquire as to whether it had been committed by the defendant, and if there had been any evidence whatever, even of the very slightest description, he would have been the sole judge of the weight to be attached to it, and this Court could not review his decision, though the evidence might be, in the opinion of its members, too slight to justify warrant a conviction. But this does not prohibit the wholesome exercise of the power of the Superior Courts to interfere to prevent the injustice of allowing a person accused of an offence to be convicted without any evidence. The power of the magistrate under the Canada Temperance Act is not greater than the common law power of a jury in the trial of criminal offences; yet the Judge in criminal cases determines whether there is or is not evidence which should receive the consideration of the jury. In the present case, had the sale of liquor been an indictable offence, and the defendant had been indicted for its commission, I am of opinion there would have been no evidence to submit to the jury, and an acquittal would have been directed.

The charge in the information laid on the 2nd August, 1883, was, that the defendant, at the town of Milton, within the space of thirty days, to wit, on or about the 30th of July, did unlawfully sell intoxicating liquor, in contravention of the second part of the Canada Temperance Act, 1878. The evidence given to support the charge was that of three persons—George Lavery, Charles Knees, and William H. MacNab. [The learned Judge here read the evidence as given, *ante* p. 128.] This constitutes the whole of the evidence offered before the defendant was called. The defendant's refusal to

answer the question put to him, on the alleged ground that in so doing he might criminate himself, does not amount to any evidence that he committed the particular offence charged, and the magistrate ought not to have accepted the refusal, but should have compelled an answer. The ground of objection was raised by counsel to his answering, and he adopted it.

If there is anything in the evidence on which the opinion of a jury could be asked as to whether the defendant sold intoxicating liquor, either on the 30th July, or at any time within thirty days before the laying of the information, this Court is ousted of jurisdiction and cannot review the magistrate's decision. If there is not, then the magistrate was acting entirely without jurisdiction, and the question of weighing the evidence or reviewing the decision on the merits does not arise. If each of the witnesses called had said positively that he did not drink, or see drank or sold any liquor in the defendant's house, could the magistrate have legally assumed that they were all swearing falsely and convicted the defendant? It appears to me that presented thus it would be impossible to contend such a conviction could be upheld. But in what way is it to be got rid of if this Court has not the right to exercise its supervisory control over inferior Courts in the interest of liberty and individual safety? The power ought to exist, *ex vi necessitatis rei*, under the common law, if authority were wanting to support it; but happily it is not wanting, and clearly exists. In our own Court of Queen's Bench the case of *Regina v. Howarth*, 33 U. C. R. 537, is directly in point, and its authority has not been shaken, it seems to me, by the case of *Regina v. Bolton*, 1 Q. B. 66, which, except for the wide language of the Court, quite applicable to the facts in that case, is unlike and distinguishable from the present case. That case was decided long before *Regina v. Howarth*; and, though *Regina v. Bolton* is not referred to in the latter case, the authorities considered in *Regina v. Bolton* are reviewed, and apparently received the fullest consideration; from which I infer *Regina v. Bolton* was

not overlooked, but deemed inapplicable to the circumstances of a case where there was a want of jurisdiction, from the absence of evidence to support the charge. The language used by Chief Justice Richards, in delivering his judgment in *Regina v. Howarth*, shews that he was fully alive to the distinction between no evidence and slight evidence in its effect upon the duty of the Superior Court in dealing with convictions brought before it on an application to quash. He states, at p. 546, "Several of the cases to which I have referred have been those in which by the decisions the magistrates gave themselves jurisdiction to try the case. In these cases it may be urged the Courts will require more evidence than in those cases where the right to try the offence is clear, but the magistrates are only to consider the evidence to shew the guilt of the party. I do not understand that they will uphold a conviction when there is no evidence; and no evidence, I apprehend, means no reasonable evidence to justify the conclusion; not a conflict or weight of evidence, or weighing of evidence."

This view is more favourable to the defendant, and carries the duty of the Court further with regard to considering the character of the evidence than is at all necessary for the decision of the present case; for if I am right in my estimate of the facts deposed to, they do not only not amount to reasonable evidence that the defendant committed the offence charged, but to no evidence whatever, not even a scintilla.

But it is said the Act, against which the offence is alleged to have been committed, by its express enactment takes away both the right of appeal and the power to grant a *certiorari* where the magistrate, as in this case, is a police magistrate, and this Court is thus ousted of the power it inherently possesses where the right to a *certiorari* to bring into Court the proceedings exists, which only brings us back to the consideration of the question, has a magistrate the right to convict of his mere not, without evidence?

The case most strongly relied on in support of this con-

tention, on the argument, is that of *The Colonial Bank of Australasia v. Willan*, L. R. 5 P. C. 417, in which, no doubt, the language of Sir James W. Colville goes far to support the contention, though it does not go the full length of doing so. There was in that case abundant evidence to sustain the finding questioned.

At page 442 he said, in reference to the term want of jurisdiction: "It is necessary to have a clear apprehension of what is meant. There must of course be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon certain proceedings which have been made essential preliminaries to the enquiry, or upon facts or a fact to be adjudicated upon in the course of the enquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge, or on the nature of the subject matter, or on the absence of some essential preliminary, must obviously in most cases depend upon matters which whether apparent on the face of the proceedings or brought before the Superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that having general jurisdiction over the subject matter he properly entered upon the inquiry, but miscarried in the course of it. The Superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to retry a question which the Judge was competent to decide."

This language, disassociated from the facts of the case, would be very strong against the right of this Court to interfere in the present case; but it must be considered in connection with the facts in regard to which it was used, and in relation to the authorities cited to

support the principles enunciated. These authorities either deal with the question of want of jurisdiction, through non-observance of some preliminary necessary to give jurisdiction, or to cases where there was an effort to impeach by affidavit the decision on the merits, or where there was a conflict of evidence; and the cases that treat of the right of the Court to interfere where there is no evidence or no reasonable evidence upon which the conviction may be supported are left untouched. That it was not intended to overrule or question these is to be inferred from the language of the same learned Judge at page 446, where he makes the following summary:

"The order then was one made by a competent judge, shewing on the face of it that every requirement of the statute under which it was made had been complied with; ordering that which the Judge on proper grounds had power to order; and containing an express adjudication upon a fact which, though essential to the order, the Judge was both competent and bound to decide, viz., that the sum claimed to be due to the petitioning creditors was then due to them from the mining company. *Nor can it be said that there was no evidence to support this finding, since the affidavit filed in support of the petition distinctly swears to the debt.* This being so, it seems to follow that the Supreme Court could only arrive at the opposite conclusion upon a re-trial of the petitioning creditor's debt, and that upon evidence which was not before the inferior Court. To do this, and to quash the order upon a conclusion thus drawn, is clearly contrary to the principles established by *Regina v. Bolton*, and that class of cases,"

The reference here made to the fact that it could not be said there was no evidence to support the finding, and this being so it would be retrying the case, clearly indicates that if there had been no evidence the Court would not have been precluded from interfering.

The case most difficult to distinguish from the present is that referred to by my brother Armour, of *Ex parte Howard*, 15 Q. B. 120, which would appear from the language of the Judges to be directly in point, but there was evidence in one case of the several alike in char-

acter, before the Justices, and they may have acted on that. It is not so put, however, but the case is not in accordance with the principles laid down in the English authorities, to which I shall refer, or in the case of *Regina v. Howarth*; and as the Courts never had the right to review the decision of magistrates on the merits, whether the right to *certiorari* was taken away or not, I do not see how the taking away of the writ should prevent the Court from enquiring whether there was any evidence at all to support the conviction, evidence being an essential of jurisdiction.

In *Rex v. Smith*, 8 T. R. 588, the conviction was for selling bread, contrary to the provisions of a statute, within 24 hours after it was baked, to one Robert Chappell. Objection on *certiorari*, there was no evidence to support the conviction. In giving judgment Lord Kenyon, C. J., said:

"I fear that this objection cannot be got over. There is no evidence whatever to shew that the bread was sold, as the information charges, to Robert Chappell. The evidence of the first witness rather negatives it, for, according to her account, the bread was sold to Mary Chappell, as she swore that 'she kept the shop,' and it does not appear that she was the wife of Robert Chappell or employed by him. And the testimony of the next witness only shews that Robert Chappell kept a shop in Drury Lane, but not that he kept the shop in question. If indeed there had been *any* evidence whatever, however slight, to establish this point, and the magistrate who convicted the defendant had drawn his conclusion from that evidence, we would not have examined the propriety of his conclusion, for the magistrate is the sole judge of the weight of the evidence. * * But the objection that it does not appear that the bread was sold to Robert Chappell seems decisive. On that ground I think the conviction must be quashed."

To the like effect is the opinion of the Judges in *Re Bailey*, 3 E. & B. 607.

The statute, in the case of *Rex v. Smith*, did not, as in this, make provision against the removal of the proceedings by *certiorari*; but that can make no difference if I am

right that by reason of the want of evidence there was no jurisdiction.

Sitting as a Judge in vacation, I held, in *Regina v. Bennett*, 1 O. R. 445, a prosecution under this same Act, that there being no reasonable evidence in support of the offence, the conviction should be quashed. It was not in that case urged before me that the removal of the proceedings by *certiorari* was prohibited, and I did not consider that question then; but the authorities are clear that, if the magistrate acts without jurisdiction, the *certiorari* is not taken away, though the proceedings are had under an Act that does, in express terms, prohibit the removal or review of such proceedings.

Ex parte Bradlaugh, L. R. 3 Q. B. D. 509, is such a case, and the writ was granted notwithstanding. The question was also considered by me in *Regina v. Walsh*, 2 O. R. 106; but as it did not appear in that case that the second part of the Temperance Act, 1878, was in force, it was not necessary to decide it.

There is no doubt, though the magistrate has jurisdiction over the subject matter of the enquiry and of the person of the accused, if in the course of the investigation anything turns up to shew a want of jurisdiction in the particular case, the magistrate must stay his hand; and if he fails to do so, and convicts the accused, the proceedings may be removed and the conviction quashed. It is not therefore the right to inquire at the commencement that is the sole requisite of jurisdiction. It must appear up to the pronouncing of the decision there is jurisdiction. Now the moment it appears after the investigation that there is no evidence against the accused, that moment the Justice ceases to have any jurisdiction over him. He then stands exactly in the same position as one who had never been charged, or against whom no evidence was given, and I should have thought it could not be contended for a moment, if a magistrate convicted a person who had never been charged, or against whom no evidence had been offered before him of any offence, this Court could not

enquire into the proceedings, and relieve the person convicted from the penalty imposed upon him, because the offence named in the conviction was one in respect to which the magistrate was competent or had jurisdiction to enquire, and the statute under which the enquiry appeared to be made in express terms prohibited the removal of the conviction by *certiorari*.

While the conviction exists it is a bar to an action, and if the proceedings are not reviewed and the conviction quashed, the person injured thereby would be wholly without redress or relief. The law, I hope, is not in this monstrous condition; and I am of opinion that it is not, and that the existence of some evidence of guilt is as essential to the jurisdiction of a magistrate to convict as is the observance of some preliminary necessary to be observed before the enquiry can be entered on at all.

This is the conclusion I have arrived at, assuming that the conviction is irremovable by *certiorari* in a case like the present. But the question presents itself, does the act in fact prevent the removal of the proceedings into this Court? The contention on the part of the defendant is, that it does not, and that it is only in the class of cases mentioned in section 110 that the issue of the *certiorari* is prohibited; while on the part of the prosecution the argument is pressed that the prohibition extends to all cases that could be brought under any of the preceding sections, and the decision of the Supreme Court of New Brunswick, in *Ex parte Hackett*, 21 Pugsley, 513, which adopts that view, has been cited as conclusive on the point. The Court in that case was not unanimous. Palmer, J., held that the *certiorari* was taken away when the conviction was made by any of the persons specially named in section 111. In this opinion Wetmore, J., agreed. Allen, C. J., was of opinion the *certiorari* was taken away in all cases under the Act, but that an appeal would lie where the conviction was by two Justices. In this opinion King and Duff, JJ., concurred, the former giving his reasons, and the latter adopting those of the Chief Justice. Weldon, J.—

dissented, stating that in his view the *certiorari* was not taken away, and that the grammatical construction of section 111 of the Act was, in his opinion, to that effect.

My learned brothers adopt the conclusion of the majority of the Supreme Court of New Brunswick, and it will, I fear, be regarded as somewhat presumptuous on my part to express a contrary opinion. But the parties are entitled to have the opinion of each member of the Court, and I cannot adopt, in the present position of the case, a view that appears to me to be erroneous, because several other Judges have concurred therein, though I entertain the most profound respect for their opinions, and concede that from their great ability and experience they are more likely to be right than I am. I will state briefly why I think the *certiorari* has not been taken away in any case except those expressly mentioned in section 110. The framers of the Act seem to have grouped the provisions relating to offences under the Act in classes. Section 99, which constitutes the second part of the Act, expressly prohibits the sale or barter in any manner of intoxicating liquor in any county or city where the law is in force, except in the circumstances specially mentioned and referred to in the clause. Section 100 fixes the penalty for a violation of section 99. Section 101 indicates who may prosecute to recover the penalty. Section 102 relates exclusively to a prosecution by a collector of inland revenue, who is one of the persons authorized under section 101 to prosecute. Section 103 indicates the persons before whom the prosecution may be brought in the several provinces. Sections 104 and 105 are to the like effect. Section 106 limits the time for commencing the prosecution to three months from the commission of the offence. Section 107 makes applicable in prosecutions for any offence under section 99 the provisions of the Act respecting the duties of Justices of the Peace out of Sessions in relation to summary convictions and orders, "so far as no provision is hereby made for any matter or thing which may be required to be done with respect to such prosecution."

Section 108 provides for the granting of search warrants to search for liquor. Section 109 provides that when any person has been convicted for an offence against section 99, or, as it is called, the second part of the Act, the magistrate may forfeit any liquor brought before him under the search warrant, and cause the destruction of the vessel containing the same. Then section 110 provides as follows: "Any person who, either before or after the summons of any witness *in any such case*, tampers with such witness, or by any offer of money, or by threat or otherwise, directly or indirectly, induces or attempts to induce any such person to absent himself or herself, or to swear falsely, shall be liable to a penalty of \$50 for each such offence." This is quite a new offence, and is not an offence against the second part of the Temperance Act at all. Then follows the 111th section relating to *certiorari*, providing that "no conviction, judgment, or order *in any such case* shall be removed by *certiorari* or otherwise into any of Her Majesty's Superior Courts of Record." Section 112, immediately following, declares any person who having violated any of the provisions of this Act, or of any Provincial Act which is now or may be, from time to time in force in any Province respecting the issue of licenses for the sale of fermented or spirituous liquors, or of *The Temperance Act of 1864*, compromises, &c., the offence with any person with the view of preventing any complaint being made, or if a complaint has been made, with the view of getting rid of it, shall be guilty of an offence under the Act, (not the second part of the Act, it is to be observed) and on conviction shall be imprisoned at hard labour for three months.

Sections 113 and 114 are of the like nature as 112. These are provisions that constitute the offences under the Act, the penalties and tribunal or persons before whom the offences may be tried. Sections 115 to 123 relate to procedure. Section 115 provides for the statement of the offence in informations respecting the sale or disposal, &c. of intoxicating liquor. Section 116 relates to amendme-

in case of variances, and section 117 declares: "No conviction or warrant for enforcing the same, or other process or proceeding under either of the said Acts" (Temperance Acts of 1864 and 1878) "shall be held insufficient or invalid by reason of any variance between the information or (*sic*) conviction, or by reason of any other defect in form or substance, provided it can be understood from such conviction, warrant, process or proceeding, that the same was made for an offence against some provision of such Act within the jurisdiction of the justices or magistrate, or other officer who made or signed the same, and provided there is evidence to prove such offence, and no greater penalty is imposed than is authorized by such Act."

Section 118 provides that upon any application to quash such conviction, or warrant enforcing the same, or other process or proceeding, or to discharge any person in custody under such warrant, whether such application is made in appeal or upon *habeas corpus*, or by way of *certiorari* or otherwise, the Court to which or Judge to whom such appeal is made, or to which or to whom such application has been made upon *habeas corpus*, or by way of *certiorari* or otherwise, shall dispose of such appeal or application upon the merits, notwithstanding any such variance or defect as aforesaid."

I do not see how it is possible to give effect to these provisions if *certiorari* is taken away in prosecutions for a violation of clause 99, because, assuming that the learned Judges who decided in *Ex parte Hackett*, to which I have referred, that an appeal may lie from the decision of two ordinary justices of the peace, are right, such appeal would not take place in this Province, at all events, by way of *certiorari*; and the use of that word indicates that the Legislature contemplated an application being made to the Court in such manner as to induce the Court to inform itself of what has been done by the inferior tribunal or magistrate, in the ordinary way, by *certiorari*; or it was contemplated that a Superior Court might be applied to by way of summary application to quash. It is to be observed

that the Superior Court is not prohibited in terms from reviewing the magistrate's decision. The provision is merely that no conviction, judgment, or order in any such case shall be removed, by *certiorari* or otherwise, into any of Her Majesty's Superior Courts of record. This provision, if the intention of the Legislature was to prevent a review of the magistrate's decision, is not aptly framed to accomplish the end, and, read in connection with section 118, cannot, without making the latter clause useless and senseless, properly be so construed, unless, indeed, it is to be held that, where the conviction is by two magistrates, the power of review by the Superior Court is not interfered with, and the prohibition to removal of the conviction in section 111 only applies to convictions by the persons specially indicated in that clause.

The majority of the Court in *Ex parte Hackett* was of opinion the *certiorari* was taken away in all cases, though a consideration of the language of section 118, which, as far as necessary to the elucidation of this point, is substantially as above stated, would rather seem to support the opinion of those Judges who held that it was not taken away where the conviction was by two justices. While this latter construction gives effect to the provisions of section 118, it would seem to do violence to the first provision of section 111, which in terms takes away the *certiorari* altogether, while the other part only prevents an appeal where the conviction is by the special magistrates therein mentioned. It is a well understood principle of law, that the Superior Court is not ousted of jurisdiction except by express words, and it is clear, it seems to me, that the Legislature intended the Superior Courts to have a power of reviewing the proceedings of the magistrate, though not for the purpose of trying the case upon its merits, except in so far as it might be necessary to consider the merits to prevent a conviction failing, if in truth an offence had been committed, and there was evidence to shew it, but for the purpose of seeing there had been no excess of jurisdiction or improper exercise of power. The

way in which, according to the established practice of the Superior Courts, they review the decision of tribunals of limited jurisdiction, is by bringing the proceedings before the Court by *certiorari*; and when that writ has been obeyed, and the proceedings have been returned in obedience to it, the proceedings become *quasi* records of the Superior Court, and are beyond the control of the convicting magistrate. The language in the present case said to prevent the removal of the conviction would prevent its removal for the purpose of becoming a record of the Superior Court; but that does not necessarily prevent a review of the proceedings, and the words used are inapt to prevent such review.

In *Regina v. The Inhabitants of Sandon*, 3 E. & B. 548, it was held sec. 107 of the Act 5 & 6 Wm. 4, ch. 50, which enacted that no matter or thing done or transacted in or relative to the execution of the Act should be removed or removable by *certiorari*, did not prevent the removal of an indictment found at the Assizes, though by a proviso to sec. 95 it was provided that an indictment found at the Quarter Sessions might be removed, and nothing was said about one preferred at the Assizes. The case is meagrely reported. The case of *Rex v. Moreley*, 2 Burr 1041, is a very strong case, not interfered with or questioned by later decisions, that nothing short of express words prohibiting the issuing of the writ of *certiorari*, or the jurisdiction of the Court, will suffice to prevent the Court exercising its superintending authority over all Courts of inferior jurisdiction.

The words of the statute in question there were: "No other Court whatsoever shall intermeddle with any cause or causes of appeal, but that they shall be finally determined in the Quarter Sessions only."

Looking at the law as it has thus been adjudicated, and the language of section 118, it would have been very doubtful in my mind whether the words used in section 111 could be held to have the force of depriving the Court of its control over the proceedings, conceding that that

section does extend to all the cases preceding it in the Act, were it not that there are authorities in our own Courts as well as in England which go the length of deciding the words used do take away the powers of the Court to bring the proceedings before it where jurisdiction exists. The language used is very similar to that in the Act 32 & 33 Vic. ch. 31, sec. 71, under which in *Regina v. Johnston*, 30 U. C. R. 423, it was held the proceedings could not be removed.

The right then in the present case to the *certiorari* can only be maintained on one or other of the two grounds: that the prohibition in section 111 is confined to cases under section 110, or that there being no evidence the magistrate acted without jurisdiction in convicting. It appears to me that the view of Weldon, J., in *Ex parte Hackett*, that the grammatical construction of the words "in any such case," in section 111, confines their application to the cases in section 110, is correct, though it appears difficult to give effect to the word 'order' in the section, as in section 110 there does not appear to be any proceeding on which an order as distinct from a judgment or conviction could be made, while under section 109, which immediately precedes section 110, there is power to make an order directing the destruction of any vessel found under search warrant containing intoxicating liquor.

But I find in the Temperance Act of 1864, clause 36, which in terms is the same as section 111, the word "order" is used, and there is nothing in the Act to which it could apply, and the word would appear to be used as of the same import as conviction or judgment. The word judgment itself is one and the same thing, and appears to be so used in the Act as conviction. The difficulty created then by the presence of the word "order" in the sentence is less than to find anything to which the language of section 118 can be applicable, unless the operation of section 111 is confined to cases arising under section 110. The Legislature in its wisdom may have regarded an offence under this section as one of a peculiar nature, and of a character to disentitle a person convicted to any protection.

whatever not to be found in the discretion and judgment of the magistrate, while it left offences against the other provisions of the Act to take the ordinary course of offences within the summary jurisdiction of magistrates. What the object really was in the distinction, if it be a distinction, it is not essential the Court should be informed, for such object not appearing within the Act itself the Court has no right to regard it. I am of opinion, therefore, that sections 116 and 118 cannot usefully and beneficially exist without confining the operation of section 111 to cases within section 110; and under the rule that a statute should be so construed as to give full and reasonable effect to all its enactments, section 111 should and must be so confined. The proviso in section 116 requiring the existence of evidence to sustain the charge would seem to be a legislative declaration, if that were needed to support the requirement in that respect of the common law, that a conviction without evidence is not to be supported.

I think the defendant was a competent witness, and if he had given any evidence against himself from which the commission of the offence charged could be inferred, the magistrate might have called upon him for his defence, and if he failed to rebut the charge in the opinion of the magistrate, he might have been convicted; but, under the Act, without some evidence to be rebutted it was not competent to the magistrate to put him on his defence, and in doing so the magistrate exceeded his jurisdiction, because by the express direction of the Act there must be evidence from which it may be inferred an offence against the Act has been committed before the accused should be called on to make a defence; and in this provision the Act merely maintains the requirements of the common law, and prevents the unlawful and exceedingly reprehensible abuse of the magisterial authority which would be committed, and was, in my opinion, committed in this case from the want of observance of this A. B. C. principle of natural justice. The conviction should, in my opinion, be quashed.

Order nisi discharged, with costs.

[QUEEN'S BENCH DIVISION.]

SHANLY, EXECUTRIX OF SHANLY V. GRAND JUNCTION
RAILWAY COMPANY.*Contract of hiring—Limitation of action—Evidence—New trial.*

The plaintiff's testator was chief engineer of the defendant company from its inception until arrangement made by the company with one B. for the completion of the road by B., he paying all expenses, &c., including the engineer's salary. In 1881 the testator wrote a letter to the solicitor for the Grand Trunk Railway Company, which company was about to resume control of the defendants' railway, claiming for services rendered the defendant company up to the middle of 1875. The action was commenced in February, 1882, for services rendered from 1871 to 1875. At the trial an amendment was made allowing the plaintiff to claim for services rendered up to 1880. It appeared that the testator was to have had a salary, but the amount was never fixed. During the period from 1875 to 1880 or 1881 he performed services as engineer for the defendant company, certifying to work done, that the company might obtain bonuses, attending meetings and deputations. He also approved of plans of a bridge submitted to him, and in 1878 signed the specifications appended to the contract between the company and B.

Held, HAGARTY, C. J., dissenting, that there was evidence to go to the jury of a continuing employment of the testator subsequent to 1875 and of services rendered as chief engineer within the six years preceding action, notwithstanding the letter written by the testator claiming for services up to 1875 only; and that any inference to be drawn from the writing of the letter was for the jury and not for the Judge to draw; and a non suit was set aside.

Per HAGARTY, C. J.—The evidence shewed that the testator, though nominally chief engineer of the defendant company subsequent to contract with B., was in fact working for B. to whom he looked for payment.

The effect of letters written by the company's president after the plaintiff's claim had been barred, and of reports made to the company by the testator in which the plaintiff's claim was included, was discussed as to their sufficiency to revive the claim.

ACTION begun by the testator on 15th February, claiming that from 1871 to 1875, the plaintiff was employed by the defendants in locating their line of railway, preparing plans, specifications, &c., and was chief engineer of the construction, and continued in such employment till 1880, and that payments on account of such services had from time to time been made by defendants to plaintiff, and that there remained due to him upwards of \$10,000.

1. Defence. Denying these allegations.
2. Payment.
3. Statute of Limitations.

Replication, alleging an acknowledgment in writing signed by defendants' or their agent within six years before action.

2. Acknowledgment by part payment on account.

3. Acknowledgment in writing since action brought.

The testator died, after the writ was issued, on the 13th day of September, 1882.

The case was tried at Belleville before Burton, J. A., and a jury.

The minute books of the company were produced. The company was started about 1870. The president (Kelso) was called by the plaintiff. He was president up to 10th March, 1882, when the company was amalgamated with the Midland Railway under the Ontario Act, 45 Vict. ch. 67.

An agreement entered into by this defendant company and several others was set out, and the different companies formed into one under the name of the "Midland Railway Company of Canada;" all pending suits to be continued as before against each company, but only the assets of that company to be answerable.

In the autumn of 1878 the company agreed with one Bickford and others for the completion of the road, the latter agreeing (*inter alia*) to provide for and pay all engineering, secretarial, and other expenses necessary for carrying on and completing the business of the company and keeping up the organization. This agreement had at the end the signature of the testator.

The work was to be done to the satisfaction of the company's chief engineer, and his certificate to be required for payments, and the testator (Shanly) was named as the company's chief engineer; all the bonuses and assets generally were given over on certain conditions to the contractors, and they were to take the stock of the stockholders instead of paying them the amount paid up on such stock, &c., &c.

A somewhat similar agreement was made between them on the 10th February, 1880, with a like engagement as to the contractors paying the engineering expenses and other expenses necessary to carry on and complete the business of the company, and to keep up its organization.

In the first of these agreements the contractors agreed to keep up a sufficient staff of assistant engineers to locate, carry out, and measure the works, they to appoint and pay them with the approval of the engineer.

The learned Judge entered a nonsuit.

December 4th, 1883. *Read*, Q. C., and *W. Read*, moved to set aside the nonsuit and for a new trial, contending that there was evidence to go to the jury, and that the letters from Kelso should not have been rejected (a). They cited *Harris v. Osbourn*, 2 C. & M. 629; *Martindale v. Falkner*, 2 C. B. 706; *Addison on Contracts*, 8th ed., of 1883, 425; *Emmens v. Elderton*, 4 H. L. 644.

McCarthy, Q.C., *Delamere*, and *Biggar*, contra. There was no evidence of services beyond 1875. Kelso says about his letters that they were more of a personal than an official character. *Wood v. Ontario and Quebec R. W. Co.*, 24 C. P. 334, shews that a letter of the kind could not take the case out of the statute. He could not bind the company by his letter. Then, the letter contains no promise to pay, which is necessary in order to take the case out of the statute. They referred to *Bush v. Martin*, 2 H. & C. 311; *Lindley on Partnership*, 4th ed., 244; *Morgan v. Rowlands*, L. R. 7, Q. B. 493; *Bateman v. Pinder*, 3 Q. B. 574.

December 29th, 1883. HAGARTY, C. J.—It is not easy—on the materials laid before us—to understand or to state very distinctly the various conditions under which this company has passed from its formation.

If I understand rightly they had a contract with one—

(a) These letters are referred to in the judgment.

Brooks, who failed to complete it, and the work seems to have languished, if it did not wholly cease, till Bickford & Co. intervened.

Mr. Shanly was chief engineer from the beginning by resolution of the board of directors, but no salary was ever fixed. His position will, perhaps, best appear from his letter dated June 15th, 1881, in which he fully states his claim :

OTTAWA, June 15, 1881.

JOHN BELL, Esq., *Solicitor G. T. Railway, Belleville.*

RE GRAND JUNCTION RAILWAY.

DEAR SIR.—Having been informed that, in view of this railway passing into the hands of the "Grand Trunk," all unsettled accounts against the company would be paid off, I accordingly wrote to Mr. Kelso, the president, preferring my claim, and in reply he refers me to you. My claim amounts to \$7,000, as follows :

(1) 1871, 2. For services as locating Engineer	\$2,500
(2) 1873, 4, 5. For services as Chief Engineer for construction, 3 years, at \$2,000 per annum. . . .	6,000
	<hr/>
	\$8,500
Cr. By cash at sundry times	1,500
	<hr/>
	\$7,000

The above figures are based (1) on a charge of 10 per cent on the cost of the surveys and location, which amounted to \$25,000, and (2) on the promise of the president, verbally given, that I should be paid at the rate of \$2,000 per annum for services during construction as Chief Engineer. The period of such services extended from about April, 1872, to some time towards the middle of 1875, call it three years, during which time I received various sums amounting in all to \$1,500. Your kind attention to this matter will much oblige

Yours truly, F. SHANLY.

It will be observed that, writing in June, 1881, Mr. Shanly makes a full statement of his claims against the company not extending further than 1875.

It is clear that his name was continued in the contracts with Bickford as the company's engineer for several years after.

This is explained by the fact that the certificate of the chief engineer was necessary in certifying to work done to procure certain proportions of municipal bonuses and aid from the Government, and he did give such certificates.

He also did some engineering work about 1880. This is proved by Mr. Ellis, who acted as an engineer employed by Mr. Bickford, who told him to submit some plans to Shanly.

Several cheques were produced, given by Bickford to Shanly, the last one dated January 12, 1880, being "in full of claim rendered *Re G. J. Railway.*" Shanly endorses this. In fact it would seem that everything done after 1875 was paid by Bickford. He had to pay all engineering expenses, and keep up the organization of the company.

I can see no proof whatever of any service rendered or work done for these defendants since 1875, and the deceased gentleman's own full and comprehensive statement of the nature of his claims, written after all the matters given in evidence had taken place, seems to place it beyond all doubt.

He had a large claim for services rendered up to 1875. I can see no evidence which could or should have been left to the jury beyond that claim so clearly and explicitly stated by the person most interested.

Some seven months before his death he commenced the suit, we must presume, to endeavour to enforce his claim and prevent further loss of time; and probably, as I thought, the proposed transfer to the Grand Trunk would provide for payment of the defendants' liabilities.

Mr. Kelso, who was president down to the passing of the Amalgamation Act of March, 1882, states in his evidence that it was part of the arrangement that Bickford & Co. should assume the floating liabilities. I do not see any express provision to that effect in the two agreements with defendants.

He says that he prepared a schedule of the debts then due, but does not think that Shanly's name appeared in it. He also said that he did not consider that Shanly had been sufficiently remunerated for his services.

But for the defence of the Statute of Limitations, there was of course a case to go to the jury.

From the close of 1875 (though the letter speaks of services only up to the middle of that year) to February, 1882, when the action was brought, six years had fully elapsed.

I do not see anything in the agreement that the employment was of such a continuing character as to prevent the operation of the statute.

When the claimant himself seems to state that it ceased over six years before, it is impossible, in the absence of any suggestion of error or mistake, to imagine its continuance.

We are left to consider whether any acknowledgment has been proved as stated in the replication.

It was urged that four letters, written by Kelso, the president, were tendered at the trial and rejected by the learned Judge.

The short hand notes do not mention any such tender or rejection.

The letters referred to are four in number, written by Kelso, the president. The earliest, dated May 26th, 1881, says nothing of the testator's claim, but acknowledges a letter, and says he will consult the directors "about the matter."

The next, dated 14th June, 1881, merely says that "whatever claim you may have against the company, you will please send it to Mr. John Bell, who is receiving all accounts unsettled against the company. I have shewn him your letters."

It appears to have been in consequence of this letter that the testator wrote the letter to Mr. Bell, dated the next day.

This letter of the 14th June, 1881, is, we think, in

no way a sufficient acknowledgment under the statute, even if the writer had power to bind the company.

The third letter I will afterwards notice.

The fourth letter, dated 9th March, 1882, was written by Kelso after the suit had been commenced.

It contains these words: "I cannot state the sum of money the company owe you for professional services, but I know it is quite a large amount; and previous to Bickford & Co.'s undertaking the construction of the line the company kept paying you at intervals such sums of money on account that they could conveniently spare."

It seems to be settled that this letter, even if otherwise sufficient, being written after action brought, will not avail against the statute.

Bateman v. Pinder, 3 Q. B. 576, is relied on as settling this. Lord Denman says: "In *Tanner v. Smart* the earlier cases were revised, and the doctrine as to presumption of payment repudiated; and it was held that, to prevent the operation of the statute, a distinct promise was necessary. That promise must be before action brought." *Patteson Williams and Wightman, JJ.*, express the same view.

The text writers so state the rule on this authority.

Mr. Read stated, in argument, that under the Judicature Act this could be admitted, but he cited no section or rule.

In the case of counter-claim there are cases where, although arising after plaintiff had commenced his action, it may be urged. But we should require very express legislation to hold that, if there were no cause of action when the suit was commenced, a cause arising afterwards would suffice.

We must now notice the letter of 16th December, 1881 written a couple of months before action. Unlike the others, it is not written from the company's office, nor signed as president, but is marked "private."

BELLEVILLE, Ont., 16th December, 1881.

Private.

MY DEAR SIR.—Your letter of yesterday received, and showed it to Mr. Bell at a board meeting to-day. He put it into his

pocket, and said he would reply to it; so he will no doubt give you all the information asked for. Bickford was here Tuesday last, and told the secretary he would not pay any of the claims against the company. There is quite a large number the same as yours, amounting in all to upwards of \$50,000. Will assist in making him pay your claims, but of course your action will be against the company.

Yours truly,

F. ~~S~~ SHANLY, Esq., Ottawa.

THOMAS KELSO.

I am very strongly of opinion that this letter cannot help the plaintiff. It does not in any way profess to bind or to be written for or on behalf of the directors of the company. It is a mere private communication to the plaintiff, and cannot in any respect be treated as "an acknowledgment or promise made or contained by or in some writing signed by the party chargeable thereby, or by his agent duly authorized to make such acknowledgment or promise;" so that, even if these letters had been properly tendered and received, they would not help the plaintiff's case.

It was also in evidence that in October, 1881, a report was made to the investigating committee of the company, accompanied by several schedules, as to the position of affairs. It is signed by James Watt and W. Sutherland, Jr., secretary. One of the schedules is headed, "Claims filed against the Grand Junction Railway Company, incurred prior to June 1st, 1881." One of them is, F. Shanly, C. E., \$7,000. The total in schedule is \$56,821.45.

The report says: "The outstanding liabilities of the company, so far ascertained, amount to \$56,821.45; and this sum will doubtless be further augmented by other claims not yet rendered."

The report is headed "Private."

We do not see whether any or what action was taken on this report. Whether approved or adopted or not by the directors, we hardly see how it can be held any acknowledgment, &c.

Bush v. Martin, 2 H. & C. 311. The head note is:

"The commissioners under a Town Improvement Act, being in debt, appointed a finance committee, who made a report, to which was appended a schedule of 'liabilities,' including arrears of salary due to the clerk of the commissioners more than six years. The commissioners made an entry in their minute book that they accepted the report: *Held*, no sufficient acknowledgment of the debt to take the case out of the Statute of Limitations."

Pollock, C. B., says at p. 319: "There is no evidence that the commissioners so far adopted the report as to communicate with any one of the persons mentioned in the schedule, and admit that his claim was well founded, and that they would pay it. * * There is nothing to constitute an acknowledgment from which a promise to pay can be inferred so as to take the case out of the statute."

Bramwell, B., takes the same view. He says, at p. 320: "Assuming that a written acknowledgment of a debt may be addressed to a third person or to no one in particular, yet it must be signed by the party chargeable. Here the resolution adopting the report was signed by the chairman and four commissioners, but it was not signed by them as persons chargeable with the debt, or as an acknowledgment binding the body of commissioners. But then it is said the report was accepted. That might afford some evidence of a debt due from the defendant to the plaintiff's testator, on the ground that a man's conduct and demeanour, as well as a statement made to and not denied by him, are evidence against him. But that is very different from such an acknowledgment of a debt as amounts to a promise to pay it. The commissioners, in accepting the report, may only have intended to say 'there may be such a debt, but what we have now to do is to accept the report; if there is any objection to it, that may be discussed at some future time.' It is clear, therefore, that there was an acknowledgment under the statute."

In *Lowndes v. Garnet and Moseley Gold Mining Co.*, 10 L. T. N. S. 229, 33 L. T. Chy. 418, Wood, V. C., speaking of a resolution of the directors of a

company as an acknowledgment to take the case out of the statute, says: "The resolution speaks of the claim of the plaintiff, not of a liquidated or admitted debt. It simply amounts to this, a statement that a claim has been made and that the directors offer terms for a settlement of part of the claim. It is not an admission of the claim itself, or a promise to pay the whole or a part thereof, whether or not the terms offered be accepted or not."

The subject is treated of in Banning, p. 35, chs. 4 and 5. At p. 57 he quotes *Bateman v. Pinder*, 3 Q. B., 574, as shewing that an acknowledgment after action brought will be of no use.

See *Darby and Bosanquet*, p. 58, ch. 54, as to acknowledgment, where is a very full statement of the case. *Bush v. Martin* is cited, p. 57.

The general law is very clearly discussed in appeal, in *In re River Steamer Company*, L. R. 6 Chy., 827, by Lord Justice Mellish, at p. 829: "It is not the admission which takes a case out of the statute, but the promise to pay, which is implied from an unconditional admission." At p. 828, he says: "There must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."

He quotes approvingly the statement on this point in the late C. J. Jervis's "New Rules 1," and refers to *Everett v. Robinson*, 1 El. & El. 16, where Lord Campbell says: "It has been decided over and over again, that to take a case out of the Statute of Limitations there ought to be that, whether in express terms or not, which the law can treat as a promise to pay. The law infers a promise from an absolute admission."

The cases are very numerous, but we think those cited are sufficient for reference.

On the whole, I think the nonsuit was right and the motion must be dismissed.

As it was impossible not to feel that the testator's estate has, through all these shiftings of interest and responsibilities, been deprived of an apparently just claim for his services, at the trial no costs were given.

I am unable to see in this evidence that any case was made out to be submitted to the jury for services said to be rendered to defendants subsequent to Mr. Bickford's intervention.

It seems to me that the evidence shewed clearly that, though nominally the chief engineer of defendants, he was working for Bickford, whom he knew to be the paymaster. Besides, the evidence from his own letter seems to me to leave nothing for a jury as far as these defendants are concerned. There is no suggestion of any mistake or error, or omission on his part when he thus deliberately stated his claim. I hardly understand our speculating as to any other claim.

My learned brothers think there was something to be left to the jury. I certainly am not sorry that they have arrived at that conclusion, but I cannot see any evidence to be laid before the jury.

ARMOUR, J.—By his statement of claim, as originally drawn, the plaintiff claimed for services during the years 1871 to 1875 only, and as to this claim he was, I think, clearly barred by the Statute of Limitations, this action having been commenced in February, 1882; and so far I agree with the judgment of the learned Chief Justice. But, by an amendment made at the trial, the plaintiff was permitted to claim for services rendered up to 1880, the time at which he ceased to be the chief engineer of the defendant company; so that it was open to the plaintiff to recover for any services performed by him, or salary payable to him, during the six years prior to the commencement of this suit. It seems, from the evidence, that he was to have a salary; but the amount of it was never fixed. The defendant company had, however, paid him money from time to time to the amount of \$1,500 on account of his services as chief engi-

neer Prior to 1876. He continued to be chief engineer of the defendant company from 1876 down to 1880 or 1881, during which time he performed certain services as chief engineer of the defendant company. Municipal bonuses were payable to the defendant company upon his certificates of the performance of certain work by the defendant company, and he is proved to have given six of these certificates. There is evidence that plans of a bridge over the Trent were submitted to him for his approval; that he attended meetings and deputations; that he drew, or, at all events, signed the specifications appended to the contract made between Bickford and the defendant company on the 7th September, 1878, and that he made at least one report to the defendant company. Under these circumstances I do not see how it could be said that there was no evidence to go to the jury to entitle him to recover for such services as he was proved to have rendered, or for such salary as the evidence shewed him to be entitled to as such chief engineer; and there was the evidence of what the company had previously paid him, and the evidence of Mr. Ellis, to go to the jury of the value of such services, and of the amount of salary a person occupying the position the plaintiff occupied would be fairly entitled to. There is nothing in the plaintiff's letter of June 15, 1881, to Mr. Bell, which, as a matter of law, excludes the plaintiff's right to recover for these services or this salary. A strong inference of fact may, no doubt, be drawn from it as to these services and this salary, but that inference was for the jury to draw, and not for the Judge.

In my opinion, therefore, there ought to be a new trial, without costs.

CAMERON, J., concurred.

New trial, without costs.

[QUEEN'S BENCH DIVISION.]

BUTTERFIELD V. WELLS.

Solicitor and client—Retainer by assignee under Insolvent Act of 1875—Liability of assignee for costs.

The defendant's testator was a sheriff and official assignee under the Insolvent Act of 1875. The plaintiff was solicitor for the City Bank, and also for one B., upon whose petition one G. F. was placed in insolvency. The official assignee became creditor's assignee. At the first meeting of creditors, B. being chairman, the plaintiff, representing the City Bank, whose claim amounted to nearly the whole indebtedness, moved a resolution to sell certain goods of the insolvent, that the assignee should take the necessary proceedings to realize the assets, and recover certain property alleged to belong to the insolvent, and for that purpose to retain counsel, if necessary. B. became inspector of the estate, and consulted with the plaintiff, and on his advice instructed the assignee to defend and bring actions. The assignee was obliged to pay costs and damages in an action brought against him to recover goods wrongfully taken by him; and he also paid the plaintiff some costs, whereby the assets of the estate were exhausted, and a small sum in addition paid by the assignee out of his own funds. The defendant's testator was subsequently removed from the office of assignee, and a new assignee appointed, whereupon he presented a petition to the Insolvent Court, in which he alleged that he had retained the plaintiff, and had been put to great expense in bringing and defending suits as assignee, and had become liable to pay large sums of money in respect thereof, and prayed payment by the new assignee, which was refused. The plaintiff delivered his bills to the defendant's testator in his lifetime. After the death of the testator the plaintiff wrote a letter to one of his sons about the costs, in which, in relating the facts, he stated that he was attorney for the bank. The plaintiff now sued the personal representative for his unpaid costs of the proceedings carried on by him. Senkler, Co. J., who tried the case, found that the retainer was not a personal one by the assignee, but that the plaintiff had acted for the benefit of the creditors, and was in fact their solicitor.

Held, ARMOUR, J., dissenting, affirming the judgment of Senkler, Co. J., it was a question to be determined on the evidence whether the retainer was a personal one by the assignee, or whether he was acting merely on the instructions of creditors; that upon the evidence the plaintiff was solicitor for the creditors and not for the assignee personally; and, notwithstanding the admission contained in the assignee's petition, he had not incurred any personal liability for the costs.

Per ARMOUR, J. The presumption is, that when a solicitor is retained, the person retaining him is liable for the costs, and to avoid liability he must shew some special agreement to the contrary; and the evidence here not only did not displace the presumption, but shewed that the testator had always considered himself liable for the costs.

Per HAGARTY, C. J. It is the duty of a solicitor to inform his client, when a trustee, as to the advisability of taking proceedings and incurring costs, when it may become a question whether the costs will have to be paid out of his private funds or out of the trust fund or estate.

ACTION by plaintiff, a solicitor of the Court, claiming to recover the amount of his bills of costs in five suits, in which he acted as solicitor for the late James Bendleton Wells, whose executrix the defendant was.

Mr. Wells was for some years prior to and up to the time of his death sheriff of the united counties of Prescott and Russell, and was also an official assignee under the Insolvent Act. On the 1st December, 1875, a writ of attachment was issued in insolvency at the suit of David Buchan, jr., against the estate of George Furniss, and placed in the hands of Mr. Wells. On the 16th January, 1876, a meeting of the creditors of the insolvent was held; no assignee was appointed, and Mr. Wells thereby became the assignee of the estate. Resolutions were passed at this meeting under which Mr. Wells made seizure of certain goods as belonging to the insolvent, in consequence of which three actions were brought against him by persons claiming the goods, in two of which verdicts were recovered against him, and he was compelled to pay damages and cost; in the third action he succeeded. Under the same resolutions he commenced two actions to recover some money and property which was supposed to belong to Furniss's estate. In one of these he succeeded; but the estate of the defendant in it being put into insolvency, nothing was realized; the other was still pending when Mr. Wells was removed from the position of assignee by the creditors, and ordered to transfer the estate to his successor by the Judge of the County Court, in June, 1877.

All the assets of the estate of George Furniss which were realized by Mr. Wells were exhausted in paying the judgments recovered against Wells in the two suits first mentioned, and in advances made to the present plaintiffs; there were no funds belonging to the Furniss estate in the hands of the present defendant to meet the plaintiffs' claim; but the amount would have to be paid out of Mr. Wells's estate if the plaintiff was entitled to recover.

The defence set up was, that, although the plaintiff was solicitor on the record for Wells in the five suits, he was

in reality solicitor for the creditors of Furniss, especially for the City Bank (which was by far the largest creditor), and acted for them; and that Wells's name was used for their benefit; and that, beyond the funds that might be realized from the estate, Wells was not to be responsible for costs to the plaintiff.

The case was tried at the last L'Original Assizes, before Senkler, County Court Judge, sitting for Patterson, J. A., without a jury.

There was no direct evidence of such an agreement, but the defendant relied upon the following facts as supporting it:

Before George Furniss was put into insolvency the plaintiff was solicitor for the City Bank, his heaviest creditor, and was acting for the bank in prosecuting Furniss. He was also solicitor for David Buchan, jr., the creditor on whose petition Furniss was put into insolvency, and acted as Buchan's solicitor in the proceedings to put Furniss into insolvency. At the first meeting of Furniss's creditors, held on January 16th, 1876, the only persons who attended as creditors, or as representing creditors, were the plaintiff and Mr. Buchan, the plaintiff representing the following creditors:

T. H. Schneider.....	\$ 591 58
The City Bank	36,763 75
Estate of Henry Grant	10 00
David Buchan, jr., representing his own claim	375 97
David Buchan, sr.	1,087 67

Making a total of\$38,828 97

At this meeting David Buchan, jr., was made chairman, and was subsequently appointed inspector of the estate, on motion of the plaintiff. The insolvent was examined by the plaintiff acting for the City Bank, and then the following resolution was moved by plaintiff, acting for the City Bank, and seconded by David Buchan, jr., acting for David Buchan, sr., and resolved:

" That the horse, buggy, harness, sleigh, and robes of the insolvent be sold by the assignee, and also piano and other articles of furniture purchased out of the eight hundred men tioned as being proceeds of stock in Accident Insurance Company, sold by insolvent, and that the creditors of this estate indemnify the assignee for any liability with respect thereto; and also that the assignee proceed to collect any sums paid by the insolvent within thirty days from date of insolvency, and all payments made subsequent to his insolvency to any creditor: that the assignee is hereby authorized to take proceedings, criminally if necessary, against the insolvent for the recovery of the two hundred dollars stock in Accident Insurance Company transferred to his wife, and the money thereon obtained by them and spent by them; and the assignee is hereby further authorized to take proceedings for the recovery of insolvent's money held by his mother amounting to about fifteen thousand dollars, and for that purpose procure counsel, if necessary."

Three letters to Mr. Wells from David Buchan, jr., the inspector, dated 20th January, and 16th and 24th February, 1876, respectively, were put in and filed. They were all proved to be in the handwriting of a clerk of plaintiff, and signed by Mr. Buchan. They all contained directions to the assignee either as to taking possession of goods or defending actions brought against him, and the two latter directed him "for the above purposes to employ such of the moneys in your hands as may be necessary." Mr. Buchan was called as a witness, and proved that the letters were signed by him as inspector. He said: "I was directed by Butterfield in doing this. I supposed he was acting for the bank, and I was acting for the bank as well." He said also: "When anything was to be done, Butterfield, Wells, and I met, and Butterfield instructed us what was to be done."

The total amount received by Mr. Wells from the sales of the estate appeared to have been \$437. This was sworn to by his deputy, and was shewn by an account in Mr. Wells's handwriting. He was proved to have paid the solicitor for the plaintiffs in the two suits in which judgments were recovered against him for damages and costs.

sums amounting to \$303.47, and to have paid the plaintiff as retaining fees and costs, \$150. These two amounts more than exhausted all the moneys received. He also paid some other small sums according to the account put in.

The creditors afterwards removed Wells from the position of assignee, and appointed Eden Abbott Johnson in his place, and on June 19th, 1877, an order was made by the County Judge that Wells should forthwith deliver to Johnson the estate and property of the insolvent, and execute a deed of assignment thereof, it being provided by the order that Mr. Wells should have a first lien on the estate for all just charges due him and costs legally incurred by him by order of his inspector, or by resolution of the creditors, and also for his fees and disbursements as official assignee.

These costs and fees not having been paid, Wells caused a petition to the County Judge to be filed on January 21st, 1880, setting out the facts that these suits had been brought and defended by instruction of the creditors, and that he had incurred great expense, and become liable to pay large sums of money in respect thereof, and praying that Mr. Johnson might be ordered to file accounts, and attend and be examined as to his dealings with respect to the estate, and his application of the moneys arising therefrom.

An affidavit was made by Wells in support of the petition, and a certified copy of the same and of the petition was filed on behalf of the plaintiff, apparently with the object of shewing that Wells had admitted his liability to pay these bills of costs. Wells died somewhat suddenly on February 26th, 1880. The Judge declined to make any order on the petition, but it was not shewn for what reason.

After the death of Wells the plaintiff urged his family to take steps against the Consolidated Bank, into which the City Bank had merged, to collect what was owing to Wells on account of the estate of Furniss, including, apparently, the costs claimed by the present plaintiff; and a

letter from the present plaintiff to W. C. Wells, a son of the late J. P. Wells, dated January 16th, 1881, was produced by the defendant. In this letter the plaintiff gave a history of the transactions preceding the insolvency and while it was pending.

From this letter it appeared that Furniss was a member of a firm of Furniss, Buchan & Agnew, which was largely indebted to the City Bank, and that the plaintiff at first acted as solicitor for Mr. Buchan, one of the firm, in arranging for him with the bank, that, upon his depositing \$15,000 with the bank, the firm assets should be realized before levying on Mr. Buchan's private estate. Subsequently the plaintiff acted for the bank and other creditors, and he referred to the necessity of suits being brought and defended by the assignee, and to the resolutions passed authorizing his doing so and agreeing to indemnify him. Plaintiff said the cashier of the bank was advised of all this and approved of it. He said further that the late Mr. Wells "advised me that he had an interview with Mr. Renny, the cashier of the bank, about the proceedings to be taken under this resolution, and was advised to go on under my instructions as attorney for the bank."

The plaintiff gave an account of the different suits brought and defended by Mr. Wells, and of their results, and of the removal of Mr. Wells from the position of assignee, and of his own difficulties with the bank, who ceased to employ him as their solicitor.

In the affidavit made by Mr. Wells in support of the petition already referred to, Mr. Wells said, that he retained a solicitor and counsel to institute and carry on the suits in question. He also said, that the new assignee expressed his willingness to pay my fees, charges, and disbursements as assignee, but refused to pay me the costs of the various legal proceedings taken and opposed by me as aforesaid, and such costs he still refuses or neglects to pay."

The learned Judge reserved the case, and on the 26th June following delivered the following judgment:—

It is clear from the evidence that the present plaintiff was the solicitor for the creditor of Furniss who placed him in insolvency, and after the insolvency acted as solicitor for the principal creditors, including the bank. He moved almost all the resolutions at the first meeting of creditors, including the resolution directing the assignee to seize certain goods in respect of which three of the suits were brought, and to bring the other two suits. He says, in his letter to W. C. Wells, that he did this with the knowledge and at the instigation of the cashier of the bank, and this is not contradicted. He says also that Mr. Wells told him he had consulted with the cashier of the bank about the resolution and proceedings to be taken under it, and was told to go on under plaintiff's instructions as solicitor for the bank, and he does not deny that Mr. Wells did go on under these instructions, nor does he shew that Mr. Wells did not consider him the solicitor for the bank. It is clear that the plaintiff caused the different letters of instruction to the assignee to be written and signed by the inspector, by which the assignee was directed what to do in regard to the several suits, and to employ the funds in his hands for that purpose.

The plaintiff does not produce any written retainer from Mr. Wells, although Mr. Fraser says in his evidence that he thinks he saw one, but relies upon the fact that he acted as solicitor, and was so recognized by Mr. Wells.

The plaintiff was well aware of the financial position of the insolvent's estate, and knew that if the proceedings taken under the resolution did not prove successful, there would be no money out of which to pay the costs; but there is no evidence that he warned Mr. Wells as to this, nor, although the resolution states that the creditors would indemnify Mr. Wells, does he appear to have procured any reliable bond or other security; the bond given by David Buchan, jr., is said to have been worthless.

If the plaintiff had been in truth solicitor for Mr. Wells, he would surely have looked after his interests in this particular, and not have allowed him to incur these heavy

responsibilities without seeing that he was properly protected.

Nor does it seem likely that Mr. Wells, a person of considerable business experience, would have put himself in such a position as to be liable for the costs now claimed without being secured.

After considering all the circumstances of the case, I do not think they warrant my drawing the inference that Mr. Wells did retain Mr. Butterfield as his solicitor in the usual way, or that it was ever contemplated that he should be personally responsible for any costs beyond the moneys of the estate in his hands, which the inspector authorized him (in his letter) to employ in the suit. I am of opinion that Mr. Butterfield was acting really as solicitor for the City Bank, and that Mr. Wells, by advice of the bank cashier, acted upon the instructions of the plaintiff as the bank's solicitor. It is evident from plaintiff's letter to W. C. Wells that the plaintiff knew of this advice of the cashier from Mr. Wells himself, and I am of opinion that no personal liability to pay the costs attached to Mr. Wells.

The payments made by Mr. Wells to the plaintiff were made under instructions of the inspector and from funds of the estate in his hands (he overpaid these funds a small amount, not much) and I do not consider them evidence of any personal liability on his behalf. The alleged payment by W. C. Wells after his father's death, could hardly be evidence of any liability by the present defendant, but the evidence of T. D. Wells shews that it was not in fact a payment on account, but a sale by W. C. Wells of certain military accoutrements of his own, for payment of which he was willing to wait until plaintiff could recover his claim against the bank.

The only serious difficulty is occasioned by the affidavit made by Mr. Wells in support of his petition to the County Court Judge to compel a rendering of an account by the assignee, with a view of payment being obtained both of his own fees and of those costs. In this affidavit he gives a history of the various proceedings taken, and in

speaking of the Chancery suits he uses the following words: "And retained and employed a solicitor and counsel to institute and carry on the same, and in and about which I necessarily incurred great expense and disbursed large sums of money."

As the petition has a statement of the various suits attached to it, in which the costs now sued for are included, it is strongly urged that the statement is a distinct admission both of the retainer of the plaintiff and of the liability to pay him.

Upon the best consideration I can give the matter, I have come to the conclusion that I ought not to allow this to overcome the considerations I have already referred to, which lead me to the conclusion I have expressed.

I have not, of course, any explanation from Mr. Wells, but he no doubt was anxious to get the whole matter closed. He had been discarded from the assigneeship, and the plaintiff had, as shewn by his letter, ceased to be solicitor for the bank. Mr. Wells had tried to get the costs paid before he made over the estate to the new assignee, but all he could get was a first lien on the estate for them. The new assignee afterwards, while expressing a willingness to pay Mr. Wells's own costs, refused to pay the costs of these various proceedings, and Mr. Wells was now endeavouring to compel the payment. I have no doubt he was doing this quite as much in the plaintiff's interest as his own. The amount of plaintiff's claim was much larger than Mr. Wells's own claim. For these reasons I give judgment for the defendant; but in case a different conclusion should be arrived at by the Court, I will give my opinion as to the amount of the plaintiff's claim, in case he is found entitled to recover.

The plaintiff claims retaining fees in three suits. A retaining fee can only be allowed when it has been paid by the client with knowledge that he will not get it back in any event, and that it is outside the ordinary costs.

In the account put in, in Mr. Wells's handwriting, he states that he paid the plaintiff retaining fees in two cases.

I have no doubt Mr. Wells quite understood what he was **doing**, and plaintiff is entitled to those two fees. I do not **see** any evidence on which to allow the third.

The plaintiff, if entitled at all, would be entitled to the **following** amounts, taking the bills in the order in the **statement** of claim :

1st bill, \$160: by paid \$60 and \$20.	\$80 00
2nd " 79.01: by paid \$25	54 01
3rd "	68 51
4th " 76.03: by paid \$20	56 03
5th "	168 62
	<hr/>
	\$427 17
It is conceded another payment was made of	25 00
	<hr/>
	\$402 17
Deduct value of articles from W. C. Wells	150 00
	<hr/>
Balance due	\$252 17

There is no evidence when the bills were rendered, except **that** it is admitted they were rendered before Mr. Wells's **death**.

I should be disposed to add interest on the above amount **from** the first day of January, 1880.

The defendant having claimed to be indemnified by the **Canadian** Sureties Company, which had purchased the **assets** of the Consolidated Bank, the defendant's solicitor **served** a notice to that effect, with a copy of the plaintiff's **claim**, upon the secretary of the company, at the office of **the** company in Montreal. No appearance was entered by **the** company, and no attempt made further to bring it **before** the Court.

I give judgment in favour of the defendant, with costs **of** defence, but I stay the entry of judgment until the 23rd **November** next.

November 29, 1883. *Bain*, Q. C., moved to set aside or **vary** the judgment of Senkler, Co. J., and to enter judg-

RECEIVED THE FOLLOWING INFORMATION FROM THE NEW YORK OFFICE OF THE ATTORNEY GENERAL:

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

December 20th 1930 J. KENNEDY J—J am of opinion
the judgment of the learned County Court Judge is correct
and ought to be affirmed.

The first point that arises was the defendant's testimony was an "final assigner" under the Insolvency Act of 1875, rendering responsible under the circumstances appearing in evidence to the plaintiff his costs in certain suits and defenses brought and defended in the name of the testator as assignee of the insolvent estate of one George Fumelle. Or in other words, was the retainer of the plaintiff by the official assignee understood to be a personal retainer by him, with the right on the part of the plaintiff to look to him and his personal estate for payment of his services, or did the plaintiff look to the insolvent estate for payment? The learned County Court Judge took the latter view, and decided against the plaintiff, and in my opinion he was well warranted in so doing. The learned Judge has very fully set out the facts in the reasons given by him for the conclusion he came to, and it will only be necessary to refer to the facts sufficiently to make my observations intelligible.

The plaintiff was the solicitor for the City Bank, which became amalgamated with the Royal Canadian Bank, and also solicitor for one David Buchan, Jr., who had a claim against the insolvent, and acted for his father, another claimant against the insolvent. The claims of these three parties, aggregating \$38,227.39, constituted by much the greater part of the insolvent's indebtedness. The plaintiff acted for the claimant Buchan, who was the petitioning creditor in suing out the attachment in insolvency, and also acted for the City Bank at the first meeting of the insolvent's creditors, whereat only two claims beyond the three above mentioned, and amounting to the small sum of \$601.58, were represented.

At this meeting a resolution was moved by the plaintiff, acting for the bank, seconded by Buchan, and adopted to the following effect :

“ That the horse, buggy, harness, sleigh, and robes of the insolvent be sold by the assignee, and also the piano and other articles of furniture purchased out of the eight hundred mentioned, as being proceeds of stock in Accident Insurance Company, sold by insolvent; and that the creditors of this estate indemnify the assignee for any liability with respect thereto; and also that the assignee proceed to collect any sums paid by the insolvent within thirty days from date of insolvency, and all payments made subsequent to his insolvency to any creditor: that the assignee is hereby authorized to take proceedings, criminally, if necessary, against the insolvent for the recovery of the two hundred dollars stock in Accident Insurance Company transferred to his wife, and the money thereon obtained by them, and spent by them; and the assignee is hereby further authorized to take proceedings for the recovery of insolvent's money held by his mother, amounting to about \$15,000, and for that purpose to procure counsel, if necessary.”

Buchan became inspector of the estate, and, on consultation with and acting under the directions of the plaintiff, gave the defendant's testator instructions to take possession, and to defend and bring actions. In these actions the plaintiff acted as solicitor for or in the name of the assignee, and his suit is for his fees in these actions. By section 43 of the Insolvent Act of 1875 it is provided: “ No assignee shall employ any counsel or attorney-at-law without the consent of the inspectors or the creditors; but expenses incurred by employing such counsel or attorney with such consent, shall be paid out of the estate, if not recovered from any party liable therefor.”

If the plaintiff had the claim of the City Bank in his own right, and acted in the same way as he did as agent for the bank, could it be said for a moment that he was entitled to recover from the personal estate of the testator for his services; in other words, that he could appoint himself solicitor and sue the assignee, who had not the power

under the above section to appoint a solicitor without his consent for his fees? I say without his consent, for virtually he was the voice of the creditors, who could and would do nothing contrary to his wishes. But it is said that neither the testator, nor the defendant representing his estate, is in a position to take this stand and deny the retainer of the plaintiff, because, after his removal from the position of assignee and the appointment of an official assignee, he petitioned the Judge of the County Court to be paid out of the estate for these very costs, and made an affidavit to the effect that he had retained the plaintiff.

The petition was prepared and signed by Mr. O'Brien, who had been the attorney for the opposing litigants, as attorney for the testator, and was filed in the Insolvent Court 21st January, 1880.

The fourth paragraph of the petition sets forth that petitioner (the testator) incurred great expense for the benefit of the estate in instituting, maintaining and defending suits and legal proceedings of various natures, and paid and became liable to pay large sums of money in respect thereof.

Paragraph five sets forth: "All such suits brought, maintained, and defended, were so brought, maintained and defended under the instructions of the creditors and inspector of the estate, and petitioner's expenses, charges and costs in respect of the same, together with his charges as assignee, are as set forth in the statement annexed."

This statement included the amounts of the plaintiff's several bills. The petition further sets out that by an order made by the Judge on the 19th June, 1877, the petitioner was declared to have a first lien on the assets of the insolvent estate in the hands of the official assignee for all just charges due to him in respect of the insolvent estate, and for all costs legally incurred by him by order of his inspector, or by resolution of the insolvent's creditors and also for the amount of his fees and disbursements as official assignee.

In support of the petition the testator made an affidavit

the sixth paragraph whereof is as follows: "Under instructions from the said inspector and creditors I instituted proceedings in Chancery, and took other steps as assignee, as aforesaid, to recover and get in moneys and other assets alleged to belong to the estate of the said insolvent, and retained and employed a solicitor and counsel to institute and carry on the same, and in and about which I necessarily incurred great expense, and disbursed large sums of money." He further swore that at a meeting of the creditors of the insolvent, held on the 22nd May, 1877, he was removed from the office of assignee, and Edward Abbott Johnson was appointed assignee in his stead, and he was required to transfer and deliver the said estate and effects to the said Johnson, but before doing so he claimed the right to be paid his fees as assignee in and about the execution of the writ of attachment and management of the estate, and for moneys by him necessarily expended in and about calling meetings of creditors, defending and instituting actions and legal proceedings, under instructions from the inspector and creditors, and for damages and costs necessarily incurred by him as assignee, as aforesaid. This petition and affidavit, though they would be evidence of a very strong and damaging character in an ordinary action between attorney and client, in fact amount to nothing in the present case, where the origin of the alleged retainer is the direction by the retained to retain himself, and who is not acting in the interest of the client sought to be made liable, but in the interest and on behalf of another client, the City Bank. The following is his own account of the transaction, as contained in a letter written by him to the testator's son on January 6, 1881 :

" In the spring of 1875 the firm of F. B. & A. were largely indebted to the bank, and were so involved that it was thought inadvisable that Mr. Buchan (the petitioning creditor), who was the only responsible partner, to (*sic*) continue making any further allowances, or allowing the partners incur any further liabilities. With a view of settling the firm business up he applied to me to act as his solicitor, in

which I acquiesced, and arranged with the bank, on depositing \$15,000, that the firm assets should be realized before levying on Mr. Buchan's private means. I send you a copy of the written agreement to that effect. Mr. Renny was then the cashier of the City Bank, and under his instructions, verbally and by letter, the assets of the firm of F. B. & A. were realized, and proceedings taken to get the property of Mr. George Furniss restored to his creditors. In carrying these proceedings through for the bank and the other creditors, it was necessary to have proceedings by the assignee, and for him to defend actions brought against him by the Furnisses, husband and wife. At the creditors' meeting, after the examination of Mr. Furniss, a resolution was moved by me, as attorney representing the City Bank, and seconded by another creditor, instructing all these proceedings and indemnifying the assignee of (*sic*) consequences. This resolution was laid before Mr. Renny, and he was duly advised of all proceedings from time to time, and approved of everything that was done. The City Bank was, in fact, the principal claim on the F. B. & A. estate, and all that was done was instigated for the benefit of the bank, of which the then manager was fully cognizant. * * * Your late father advised me that he had an interview with Mr. Renny about the proceedings to be taken under this resolution, *and was advised to go on under my instructions as attorney for the bank.*"

This letter is infinitely stronger, as an admission against the plaintiff, than the petition and affidavit of testator are against the defendant; and it would seem to be most unjust, because the testator recognized a formal retainer under the circumstances, that his estate should be responsible for costs to the plaintiff when the plaintiff, when he was rendering the services, knew that he was rendering them, not in the interest of the assignee, but of an entirely different client. The plaintiff was not, under the circumstances, in a proper position to render to the testator the advice he had a right to expect from his legal adviser.

The judgment of the learned County Court Judge is, in my opinion, eminently just and in accordance with the law

and facts. The motion to set the same aside should be dismissed, with costs.

Under the provisions of the Act of 1875 it may be a question whether or not the claim of a solicitor for services rendered to a former assignee of the estate does not become a claim directly against the funds of the estate in the hands of the new assignee. The spirit of the Act is to give the creditors the whole control of the estate, the assignee virtually holding the position at the will of the creditors. It was otherwise under the former Acts, where the assignee could appoint his own solicitor without reference to the creditors, and the assignee was more under his control than the immediate control of the creditors.

It is not necessary to so determine in deciding this case, and I merely refer to it as a point that may be worthy of consideration.

HAGARTY, C. J.—I agree in the judgment just delivered, and in the view taken of this case in the carefully prepared judgment of Senkler, Co. J., by whom it was tried.

I think it was a question on the evidence whether the plaintiff was retained by testator on his own personal responsibility, or whether it was not a retainer to act as solicitor for the estate, looking to it for his remuneration. Everything seems to have been trusted to the plaintiff. He came as the solicitor of the bank that held 19/20ths of the whole claims against the estate. He set all the proceedings in motion, and admits that his clients, the bank, told the assignee to act under his instructions.

I certainly cannot believe on this evidence that the testator ever understood that his private estate was to be responsible for his obeying the instructions and acting on the advice of plaintiff.

It seems reasonably clear that it is the duty, morally and legally, of a solicitor to advise the client who seeks his advice as to the advisability of taking legal proceedings, when it may naturally become a question whether the

costs will have to be paid personally, or out of a fund or an estate of which the client is the guardian.

I refer to the very instructive language of the Master of the Rolls in *Re Brown*, 4 Eq. 464, as to the duty of a solicitor to warn and advise with his client, a trustee, as to his being able to charge contemplated costs against the trust estate, or whether they would fall on himself personally. I may also notice in *Re Clarke*, 1 DeG. M. & G. 48, per Knight Bruce, L. J.

I adopt the views expressed by my brother Cameron and Senkler, Co. J., and hold that we ought not to interfere.

The plaintiff must be allowed, if he desire it, to use the name of the executrix (at his own cost) or take any proceedings to recover from the estate.

ARMOUR, J.—I am obliged to differ from the conclusion of fact arrived at by the learned Judge of the County Court, and by the Chief Justice and my brother Cameron, and to find that the defendant's testator did retain the plaintiff to perform the services in respect of which this action is brought, and that the plaintiff was entitled to look to the testator, and is now entitled to look to his estate for the payment for such services. It is not disputed that the plaintiff performed these services, nor is it set up that he was guilty of any fraud, negligence, or misconduct in or about the performance of them, nor that the actions in respect of which these services were performed were improperly, improvidently, or unnecessarily brought or defended. The conduct of the plaintiff throughout seems to me to have been perfectly honest and proper, and his claim for services seems to me to be perfectly fair and just, and I cannot see upon what principle of law based upon the evidence in the case he is to be told that he is never to be paid for his services at all; for it is quite clear that unless he can recover payment for them in this action, he can never recover payment for them at all, for if the defendant is not liable to pay him for them as representing her testator, no one else is so.

The learned Judge of the County Court, if I understand him aright, does find that the defendant's testator retained the plaintiff to prosecute and defend the actions in respect of the services rendered on which this action is brought, but he finds that although the defendant's testator did retain the plaintiff to prosecute and defend these actions, yet there was some special understanding or agreement by which the plaintiff was not to look to the testator for payment,

The presumption arising from the retainer to prosecute and defend would be, that the person retaining was to pay the person retained; and if there was any such special understanding or agreement to relieve the retaining person from such liability, it would lie upon him to shew it.

There is not, in my opinion, the slightest evidence in this case to support the existence of any such special understanding or agreement; and if I came to the conclusion that there was any such special understanding or agreement, I would have to do so upon surmises, suggestions and suspicions, not only not founded upon any evidence whatever, but entirely opposed to the evidence, not only of the plaintiff, but also of the testator himself, and to other independent evidence.

It is said to be a proper conclusion from the evidence to hold that there was some such special understanding or agreement, and that, at all events, the testator was not to be liable to the plaintiff beyond the amount of moneys of the estate in his hands; but the fact that the testator paid to the plaintiff, on account of such services, money out of his own pocket, the money of the estate being exhausted, and that after the estate had been taken out of his hands altogether he presented his petition drawn up, not by the plaintiff, but by the present attorney for the defendant, to the Judge of the County Court, in which he expressly recognized and admitted his liability to the plaintiff for these services, sweeps out of the realm of imagination even the idea that the testator ever dreamed that he was to be liable to the plaintiff only in so far as the funds of the estate would extend. The testator was served with the

bills for these services; he never in any way repudiated his liability for them, but, on the contrary, expressly recognized and admitted his liability for them. Moreover, the defendant swears that she heard the testator say that he had a very large amount against the Furniss estate, and she thought she heard him say it was about a hundred pounds—an amount only consistent with the fact of his liability for the services rendered by the plaintiff.

I see nothing in the letter of the plaintiff to Mr. W. C. Wells, having regard to the time when and the circumstances under which it was written, to at all militate against the right of the plaintiff to recover in this suit, nor is there anything in section 43 of the Insolvent Act of 1875, to which we were referred, against the plaintiff's right to recover; the only effect of that section being that, in order to entitle an assignee to charge the expenses of employing a counsel or attorney against the estate, he must have employed such counsel or attorney with the consent of the inspectors or the creditors.

In my opinion judgment should be for the plaintiff for the amount found by the learned Judge, with the interest awarded by him; that is, for \$257.17, and interest from January 1st, 1880, and full costs of suit.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

LIGHTBOUND ET AL. V. WARNOCK.

Principal and surety—Promise in writing—Sufficiency of.

F. being indebted to the plaintiffs, who were pressing him for payment, the defendant signed the following document and delivered it to the plaintiffs in consideration of their giving time to F.: "I will guarantee that the security offered by Mr. John Fleming for the balance of your account will be executed and forwarded within ten days." The security referred to was a mortgage upon real estate to be executed, and a paid-up life policy for \$5,000, which F. had agreed verbally to give to the plaintiffs, neither of which existed at the time of F.'s agreement or the defendant's guaranty. F. never gave the security, and the plaintiffs, by refraining from suing him, lost their debt.

Held, affirming the judgment of Burton, J. A., HAGARTY, C. J., dissenting, that the writing signed by the defendant was not sufficient to satisfy the fourth section of the Statute of Frauds, whether regarded as an original promise or a guaranty.
HAGARTY, C. J. The guaranty is not divisible. The writing was not sufficient as to the mortgage of real estate, because the promise of the debtor himself was not enforceable against him, not being in writing; but as to the policy the writing was sufficient.

THE statement of claim alleged (1.) that the plaintiffs were merchants, carrying on business in Montreal, as Lightbound, Ralston & Co. (2.) That on the 6th of April, 1882, one John Fleming was indebted to the plaintiffs in \$1870.58. (3.) That the plaintiffs were pressing Fleming for payment thereof, and were threatening and intending to sue Fleming for the same, unless he would pay the same, or furnish the plaintiffs with security for payment thereof, whereupon Fleming proposed to execute and forward to the plaintiffs within ten days thereafter, as security for payment of the said money, a first mortgage for the said indebtedness on certain property in the Town of Galt, to wit, lots Nos. 2 and 3 of subdivision of Lot 4, on the north side of Main street, in the said Town of Galt, together with a transfer of a then existing life insurance policy for \$5,000 in the Canada Life Assurance Company on the life of said Fleming; and in consideration that the plaintiffs, at the request of the defendant, would accept the said security, and would give said Fleming ten days from the said 6th day of April,

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which to execute and forward the same to
; and that in the meantime the plaintiffs
press said Fleming for payment of the said
he, the defendant, signed and delivered to
is a written guarantee and undertaking that
curity, so offered by the said Fleming to secure
e of the said amount, should be duly executed
ered to the plaintiffs within ten days from the
f April, 1882. (4.) That the plaintiffs accepted
undertaking, and guaranteed and agreed to take
security, and gave said Fleming the said ten days
which to execute and forward the same to the
ds, and did not press the said Fleming in the mean-
or payment of the said indebtedness. (5.) That the
Fleming did not execute and forward to the plaintiffs
aid security, or any part thereof, within said ten days,
since, whereby the plaintiff lost the said security. And
plaintiffs claimed \$2,000.

By his statement of defence, defendant denied (1) that
the 6th of April, 1882, the plaintiffs were pressing Flem-
g for payment of the money alleged to be owing by
him to the plaintiffs, and that the plaintiffs were threat-
ening to sue Fleming for the same unless he would pay
the same or furnish the plaintiffs with security for the
payment thereof; and that Fleming proposed to execute
and forward to the plaintiffs, within ten days thereof, as
security for payment of said money, a first mortgage for
the said alleged indebtedness on certain property in the
Town of Galt, to wit, Lots numbered 2 and 3, of subdivision
of Lot 4, on the north side of Main street, in the said Town
of Galt, together with a transfer of a then existing life
insurance policy for \$5,000 in the Canada Life Assurance
Company on the life of said Fleming; and that in consid-
eration that the plaintiffs, at the request of the defendant,
would accept the said security, and would give said Flem-
ing ten days from said 6th day of April, 1882, within
which to execute and forward the same to the plaintiffs,
that in the meantime plaintiffs would not press Fleming

for payment of said alleged indebtedness; and that he, defendant, signed and delivered to the plaintiffs a written guarantee and undertaking that the said security, so alleged to be offered by said Fleming to secure the balance of the said alleged account, should be duly executed and delivered to the plaintiffs within ten days from the said 6th day of April, 1882. (2.) Defendant also denied that the plaintiffs accepted the said alleged undertaking and guarantee, and agreed to take the said alleged security; and that the plaintiffs gave said Fleming the said ten days within which to execute and forward the same to the plaintiffs; and that they did not press said Fleming in the meantime for payment of the said alleged indebtedness. (3.) Defendant, as to the 3d, 4th, and 5th paragraphs of the statement of claim, denied that the said alleged guarantee and undertaking was either legal or sufficient in law with reference to section 4 of an Act passed in the 29th year of his majesty King Charles II., ch. 3, and entitled an Act for the prevention of frauds and perjuries.

Joinder of issue.

The case was tried by and before Burton, J. A., at the last Spring Assizes at Hamilton, when it appeared that on the 6th of April, 1882, Fleming was indebted to the plaintiffs in \$1870.58: that they were pressing him for payment and threatening to sue him: that he offered them, verbally, as security for their debt, a paid-up policy for \$5,000 upon his life in the Canada Life Assurance Company, and a first mortgage on certain real property described as Lots 2 and 3, on the north side of Main street, in the Town of Galt. This security the plaintiffs were willing to accept, and were pressing him to have the matter closed that day. "I told Mr. Fleming," said the witness, one of the plaintiffs, "I wanted to go away by that afternoon train, and would he be kind enough to get the life policy, and get the mortgage on the property, and bring them to me at the hotel in Galt. Mr. Fleming failed to meet me at the hotel in time for the train, or about the time the train was going; consequently, I had to remain over till five, as I determined not to

leave till I got them. I told him I had definite instructions not to go till I got them. I told him we should sue him for our account, unless we had the matter settled in that way. I waited. He came some time before the time, and pressed me to leave Galt, and stated that he would forward these matters down to Hamilton by the first train. I said I may as well wait for the first train, and take them with me. I declined to go without them, and then within five minutes of the time the train went Mr. Fleming came in with a piece of paper signed by Mr. Warnock, to the effect that I will use my best endeavours to influence Mr. Fleming to forward down these securities. It was in the hall, near the stove, and I saw the paper, and I said this is absolutely useless. And just when I was reading it, and saying that it was no use, Mr. Warnock came in, and in a somewhat excitable manner said, 'What's the matter with you? What are you pressing Fleming for? There is no need for pressing Fleming; he can pay a hundred cents on the dollar.' Well, I said, this is useless, and I tore it up, and threw it by the stove. And Mr. Warnock was somewhat boisterous, and I said, we will come into the room and talk it over privately, and I went into the room, and we talked about the matter; a new guarantee was written out and was signed by Mr. Warnock. This is the guarantee:

GALT, 6th April, 1882.

Messrs. Lightboud, Ralston & Co., Montreal:

GENTLEMEN,—I will guarantee that the security offered by Mr. John Fleming for the balance of your account will be executed, and forwarded within ten days.

JAMES WARNOCK.

When he said the security offered Mr. Warnock referred to the life policy and the first mortgage on the property on Main street, the securities were discussed before Mr. Warnock. He knew what the agreement between Mr. Fleming and ourselves as to these securities was. Fleming pointed out the property, and it arose in the discussion as to the value of the property, and I said then that Mr. Fleming had valued the property

at over \$2,000, but that he had been refused \$2,000. Then Mr. Warnock valued the property at \$1,500, and I at once concurred in Mr. Warnock's valuation of the property. There was no question at all between the three of us what security was meant. Directly the guarantee was signed by Mr. Warnock we at once stopped our intention to proceed. We waited the ten days."

The "security offered" was never given, and during the ten days executions to the amount of \$896.57, and on the 26th of April executions to the amount of \$9,863.82 were placed in the sheriff's hands against Fleming, and on the 1st day of May, Fleming made an assignment for the benefit of his creditors. The amounts of these executions were collected by the sheriff, and it was sworn that had the plaintiffs put their claim in suit on the 6th of April, judgment would have been recovered by them, and execution could have been placed in the sheriff's hands, and the amount thereof realized before Fleming made the assignment.

The real property upon which Fleming offered the plaintiff's security had belonged to Fleming's father, who had died in 1876 or 1877, leaving his widow and seven children, of whom he was one, surviving him; so that his interest in this property was but an undivided seventh part thereof, subject to his mother's dower, and the value of the whole was variously estimated at from \$1,200 to \$1,500.

The learned Judge gave the following judgment:

BURTON, J. A.—The defendant is sued upon a guarantee in these words:

"GALT, 6th April, 1882.

"*Messrs. Lightbound, Rolston & Co., Montreal:*

"GENTLEMEN,—I will guarantee that the security offered by Mr. John Fleming for the balance of your account will be executed, and forwarded in ten days."

The principal debtor, John Fleming, was indebted to the plaintiffs in a considerable sum of money, a portion

of which was over-due, and it was sworn by one of them, who was examined at the trial, that the plaintiffs had closed the account, and had determined to place the over-due portion in suit unless some satisfactory security were given for it.

On the 6th April, 1882, the debtor agreed with this witness to give a mortgage upon certain property in Galt, and also a paid-up policy in the Canada Life Assurance Company for \$5,000. This was to have been carried out on the same day, and the witness waited over one train in order to have the transaction completed, and found shortly before the hour fixed for the leaving of the second train that the debtor was unable to complete it for some days, and he tendered a letter signed by Warnock, purporting to guarantee that this would be done. This, however, manifestly imposed no responsibility upon Warnock, and the witness refused to take it, and an angry altercation followed, which was interrupted by the appearance of Warnock, who, after some further discussion, signed the guarantee sued on.

It is said that the nature of the security was then spoken of, by which I suppose is meant that the debt was to be secured by mortgage on the land, and by a paid-up policy; but I do not understand that the term for which the mortgage was to run was discussed, or the rate of interest to be paid, nor was there any discussion as to the nature of the paid-up policy, whether it was an endowment policy, or one for the full period of the debtor's life; and it was shewn that no policy for that amount was then in existence.

The counsel for the defendant objected that parol evidence was not receivable to explain the promise contained in the guarantee, whilst it was urged on the part of the plaintiffs that the parol evidence was admissible to ascertain and identify the subject matter. Whilst inclining to the opinion that the evidence was not receivable, as the very difficulty which the statute was intended to prevent would immediately arise, I determined to take all the evidence.

dence which either side desired to offer, and consider the question more at my leisure.

In point of fact the original debtor had but a limited interest in the property he proposed to mortgage, and it was already mortgaged, and he had not a paid-up policy in the company.

The question at once arises, what was the precise nature of the agreement between the plaintiffs and the original debtor? And I find it very difficult on the facts in the case to distinguish it in principle from the case of *Holmes v. Mitchell*, reported in 7 C. B. N. S. 361.

There, as here, no mortgage existed at the time the guarantee was given, and here the debtor was not possessed of any paid-up policy for the amount specified in the Canada Life.

If the terms of these instruments were fully understood and agreed upon between the parties, which has not been shewn, the whole promise is not in writing, as the statute requires that it should be, but has to be made out with the aid of these previous conversations. If the mortgage and policy had been then in existence, I could understand the admissibility of the evidence for the purpose of shewing what security was referred to, and the subject matter which the parties had in their contemplation when the guarantee was given.

I think the evidence was not receivable, and I do not think it necessary to consider the other objection raised as to the original debtor being under no legal liability to carry out his engagement either on the ground that the verbal contract to give the mortgage was not enforceable, or that the agreement as to the policy was too vague and uncertain to form the subject of legal liability.

As to the first point, it could not, I think, be assumed in this action that the original promisor would set up the defence of the Statute of Frauds in a suit against himself; and if the plaintiffs here claim the benefit of a policy of the smallest value to themselves, and imposing the least

liability on the debtor, it might perhaps not lie in his mouth to set up the ambiguity.

It is, however, unnecessary, in the view I take of the other point, to consider these; but holding that the promise alleged is not proved, I must give judgment for the defendant, with costs.

On May 29, 1883, *Osler*, Q. C., moved for an order to set aside this judgment, and enter it for the plaintiffs for \$1870.58, or such other sum as the Court might direct, upon the ground that the evidence adduced entitled the plaintiffs to a judgment in their favour, and on the ground that the judgment for the defendant was contrary to law and evidence, and the weight of evidence, and for such further or other order as to the Court should seem meet. He argued that the words, "the security offered by Mr. John Fleming," were words of description, and referred to *De Colyar*, 167; *Heffield v. Meadows*, L. R. 4 C. P. 595; *Cave v. Hastings*, 7 Q. B. D. 125; *McDonald v. Longbottom*, 1 E. & E. 977.

MacKelcan, Q. C., contra, contended that plaintiff could not make out the contract without parol evidence, which could not be given, citing *Holmes v. Mitchell*, 7 C. B. N. S. 367. He admitted that evidence might be given to identify the subject matter when it was in use, but not otherwise, referring to *Benjamin on Sales*, 3rd Amer. ed. 193, and argued that there could, at any rate, be no liability of the surety unless the principal was bound, which he was not here: *Mountstephen v. Lukeman*, L. R. 7 Q. B. 202. As to damages, he cited *Mayne*, 411, and *Hickman v. Hynes*, L. R. 10 C. P. 568.

Osler, Q. C., in reply, referred to *Harris v. Venables*, L. R. 7 Ex. 235; *DeColyar*, 61 *et. seq.*

Dec. 29, 1882. ARMOUR, J.—I am of opinion that the offer of Fleming to give the plaintiffs a paid-up policy for \$5,000 upon his life in the Canada Life Assurance Company, and a first mortgage on certain real property,

described as Lots 2 and 3, on the north side of Main street, in the Town of Galt, was not too vague and uncertain to prevent the recovery of damages for the breach of an agreement that he would carry out such offer.

"It will be obvious that an amount of certainty must be required in the specific performance of a contract in equity greater than that demanded in an action for damages at law. For to sustain the latter proceeding, the proposition required is the negative one, that the defendant has not performed the contract, a conclusion which may be often arrived at without any exact consideration of the terms of the contract, whilst in equity it must appear not only that the contract has not been performed, but what is the contract which is to be performed.

"It may, however, be laid down that the Court will carry out an agreement framed in general terms, where the law will supply the details; but if any details are to be supplied in modes which cannot be adopted by the Court, there is, then, no concluded agreement capable of being enforced: *Fry on Specific Performance*, ed. of 1858, secs. 350 and 361.

"The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life, and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same on the other:" *Dalby v. The India and London Life Assurance Co.*, 15 C. B. 365, at p. 386.

A paid-up policy for \$5,000 upon the life of a person, as commonly and ordinarily understood, is a policy by which \$5,000 is payable on the death of the person insured, and a policy in respect of which the annuity or annual premiums have been prepaid.

In *McDonald v. Murray*, 2 O. R. 573, the Common Pleas Division held that an agreement for the purchase and sale of land upon the terms, among others, that the defendants should pay the plaintiff the sum of \$4,000 on the execution of the agreement, and \$40,795 within sixty days from the date of the agreement, and the balance, \$15,205, to remain on mortgage at seven per cent, was not void for uncertainty, no time being mentioned for the payment of the mortgage money.

The mortgage in the case in judgment was to be given as security for the debt, and whether it should bear interest or not, there being no agreement on the subject, or when it should be payable, there being no agreement as to this, were details which the law would supply, and the agreement being silent as to them would not render it incapable of being enforced.

It was a good deal discussed whether the instrument sued on was an original promise or a collateral one; but if it is to be regarded as an original promise, it had to be in writing as a contract concerning lands within the fourth section of the Statute of Frauds: *Horsey v. Graham*, L. R. 5 C. P. 9; and if as a collateral one, it had also to be in writing as a promise to answer for the default of another within the same section.

In either view the same question arises, namely, is it a sufficient writing within the fourth section of the Statute of Frauds?

The case of *McDonald v. Longbottom*, 1 El. & El. 977 was much relied upon by the plaintiffs' counsel, but that case is quite distinguishable from the present. The subject matter of the contract in that case was a specific article, "your wool," and was in the writing, and merely required identification; but here the specific instruments to be executed are not in the writing, and cannot be identified, for they do not exist, and are only referred to in the writing as "the security offered by Mr. John Fleming." What that "security" was to be, whether of goods or of lands, and of what goods or what lands, and what was to

be its terms, nature, and effect, must all be supplied by oral testimony before it can be understood what was the security that was offered.

No case was cited, nor have I been able to find any going the length of holding such a writing a sufficient writing within the fourth section of the Statute of Frauds, and many cases shew by analogy that it is not a sufficient writing.

I think the motion must be dismissed, with costs. See *Ridgway v. Wharton*, 3 DeG. M. & G. 677; *Wood v. Widgley*, 2 Sm. & Giff. 115; *Hyde v. Cooper*, 13 Rich. (S. C.) Eq. 250; *Whelan v. Sullivan*, 102 Mass. 206 *Waterman v. Meigs*, 4 Cush. 497.

HAGARTY, C. J.—Is this to be considered as a guaranty or promise to answer for the debt, default, or mis-carriage of another, or is it to be held an original promise?

It is clear that it was intended to be the first, but such intention may perhaps not always be decisive of its character. It is laid down in many places, as stated in *Brandt* on Suretyship and Guarantee, p. 75, sec. 58, that "in order to bring the promise to answer for another within the Statute of Frauds, the promise must be made to the person to whom the other is already or is thereafter to become liable."

273 Notes to *Birkmyr v. Darnell*, 1 Sm. L. C., 7th ed., at p. 273; *Lakeman v. Mountstephen*, L. R. 7 H. L. at p. 24, per Lord Selborne.

It was urged that Fleming, the original debtor, was not liable to perform what he had verbally undertaken to do, though liable for the debt. He could not be made to give the real estate security, as he had not promised in writing. His promise was not void absolutely, but the action therefor could not be maintainable if he took advantage of the Statute of Frauds.

The subject is discussed in *Brandt*, sec. 44, p. 54, under the head of "When party for whom promise is made cannot become liable, promise need not be in writing." It

instances the case of a minor: *Harris v. Huntback*, 1 Burr. 373.

DeColyar, p. 52, discusses the point and calls attention to the language of Willes, J., in *Lakeman v. Mountstephen*, L. R. 7 Q. B. 196. I have not seen any English case where a distinction is taken between an absolute freedom from all liability and a liability on a promise not absolutely void, but not enforceable if defended on the Statute of Frauds. At p. 55 of *Brandt* an American case is cited where the language is, "When no action will lie against the party undertaken for it is an original promise." *Browne* on Statute of Frauds, 4th ed, sec. 165, is to the same effect.

The remarks of Blackburn, J., at p. 619, in *Lakeman v. Mountstephen*, in L. R. 5 Q. B., are very striking. The Court of Error and the Lords differed from him in his view of the facts; but except in the few remarks of Lord Selborne, his view of the law is hardly questioned. See also *Browne* on Statute of Frauds, secs. 156, 157 (a), discusses *Mountstephen v. Lakeman*.

In the Exchequer Chamber, L. R. 7 Q. B., in the last-mentioned case, at p. 202, Willes, J., says that the rule in *Birkmyr v. Darnell* should be modified to this effect: "If his," (the principal debtor's) "liability is made the foundation of a contract between the plaintiff and the defendant, and that liability fails, the promise is void; so as to include the case which I put of persons wrongly supposing that a third person was liable, and entering into a contract on that supposition. If, in such a case, it turned out that the third person was not liable at all the contract would fail, because there would be a failure of that which the parties intentionally made the foundation of the contract * * The law of contract gives you, as foundation, that a person was taken to be liable, and that the suretyship was a suretyship in respect of that liability. Take away the foundation of principal contract, the contract of suretyship would fail." On this subject see *DeColyar* 52-3.

We may assume, in the case before us, that both plaintiffs and defendant considered that Fleming had promised certain security to plaintiffs, and the guaranty was sought and given on this basis. If, by his verbal promise, Fleming had really incurred no binding liability as to the real security, the language of Willes, J., imports that the guaranty was void, the foundation being taken away.

If viewed as an original promise the plaintiffs' case seems to fail distinctly on the other section of the Statute of Frauds. It is a contract respecting an interest in lands, and there is no memorandum or note in writing shewing what the contract is.

I think it impossible to support the claim in this aspect. In the other aspect, viz., that of a guaranty, there seems the same difficulty, as neither in Fleming's contract nor in the defendant's guaranty is there any written statement of the bargain.

The case already cited of *Horsey v. Graham*, L. R. 5 C. P. 9, shews that whether the promisor has or has not any interest in the land the statute applies.

It remains to consider whether the defendant's contract is divisible—whether, although it fails as to the proposed security on the land, it must also fail as to the promised policy of assurance. The subject is discussed in *DeColyar*, 41 ; *Browne* on Statute of Frauds, pp. 165, 166, 167, 168, especially p. 170, sec. 148 ; *Brandt*, sec. 38. *Wood v. Benson*, 2 C. & J., 94, seems a strong authority in favour of the plaintiff, that part of the promise may be good, though the rest be bad. It seems to be referred to by the text writers as affording the true rule on this subject. There are several cases where the contract was held indivisible; as where it was a bargain for a farm, and the stock to be taken at a valuation, or for the letting of a house and the furniture. The Statute of Frauds defeated the part as to the farm or the house, and it was naturally held that there could not be a recovery as to stock or furniture, as the parties never contemplated the chattels passing except with the land or house. In every

case the parties contemplate the performance of all the matters contained in the bargain.

Here the two matters seem quite separable. On condition of the plaintiffs giving time to their debtor, the defendant guarantees that the debtor, within ten days, will give two things in security, a mortgage and a life policy.

The giving of the mortgage cannot be enforced. I am unable to see any valid reason why the policy should not be given.

It ought not to lie in defendant's mouth to say that, although they had given the consideration for both securities, and that he can succeed in defeating their claim to one, he is therefore entitled, on that account, to defeat their claim to the other.

If then the promise be divisible, is the document sufficient as to the policy on the Statute of Frauds? My learned brothers think it is not.

I have read a great many of the authorities, but have not found one directly in point.

"I will guarantee that the security offered by Mr. J. Fleming * * will be executed and forwarded within ten days."

I think it would be valid to guarantee that "any goods which A. B. will buy from you, I undertake he will pay for on the terms of credit to be arranged between you."

Here the nature, quantity &c., of the goods, and the terms of credit must all be explained by parol.

Many similar cases may be referred to.

I am wholly unable to distinguish such a guarantee from that before us.

"The security offered by Mr. Fleming," is, to my mind, in no way less clearly proveable by parol testimony than the quantity, quality, price, and terms of credit, which have to be proved in the example cited.

There may be a distinction, but I cannot point it out.

CAMERON, J., concurred with ARMOUR, J.

Order nisi discharged.

[QUEEN'S BENCH DIVISION.]

EDGAR AND WIFE V. NORTHERN RAILWAY COMPANY.

Negligence—Contributory negligence.

The plaintiffs, husband and wife, were on a train of the defendants, going to Lefroy. The conductor, before reaching the station, announced that the next station was Lefroy. On approaching the station the train, according to the plaintiff's witnesses, was slowed, but did not stop. The husband got off while the train was moving slowly, and his wife, seeing that the speed was increasing, and that they were passing the station, sprang after him, though he had let go of her hand, and told her not to jump, and was injured. It was left to the jury to say whether she had acted imprudently in so doing, and they found a verdict for the plaintiffs.

Held, that the question of contributory negligence was properly left to them, and the Court refused to disturb the verdict.

This was an action to recover damages for injuries sustained by the female plaintiff in jumping off the defendants' car at a station called Lefroy, on the defendants' line of railway, whilst the train was in motion.

The case was tried at the last Barrie Assizes, before Cameron, J., and a jury, and resulted in a verdict in favour of the husband for \$200, and for the wife of \$100.

The facts were shortly as follow: The plaintiffs were travelling as passengers on the defendants' railway from Toronto to Lefroy. After the train had left the station (Gilford) next to Lefroy, the conductor passed through the car and called out that the next station would be Lefroy. According to the plaintiffs' witnesses, upon coming to Lefroy the train slowed up, and several passengers got out, including the husband, who attempted to help his wife off, but the train being in motion, he let go of her hand, and called out to her not to jump. She, however, as she stated in her evidence, seeing that the speed of the train was increasing and it was passing the station, took the risk of jumping off the platform of the car, and in so doing was injured. The accident occurred at night, which the evidence showed was very dark.

The Judge charged strongly in favour of the defendants.

During Michaelmas Sittings an order *nisi* was granted to shew cause why the verdict and judgment thereon in favour of the plaintiffs should not be set aside, and a nonsuit entered, or for a new trial, on the ground that the verdict and judgment were contrary to law and evidence, and the Judge's charge; and, in the event of a new trial being granted, that the jury notice should be struck out.

December 7, 1883. *Boulton*, Q. C., supported the order *nisi*, contending there was contributory negligence on the female plaintiff's part in jumping off, which disentitled her to recover, referring to *Lewis v. London, Chatham, and Dover R. W. Co.*, L. R. 9 Q. B. 66; *Siner v. Great Western R. W. Co.*, L. R. 3 Ex. 150, 4 Ex. 117; *Davey v. London and South Western R. W. Co.*, L. R. 11 Q. B. D. 213.

Osler, Q. C., contra, argued that the defendants invited the plaintiffs to get off by calling out the station, and then slowing the train, referring to *Slattery v. Dublin and Wicklow R. W. Co.*, L. R. 3 App. Cas. 1155.

December 29, 1883. HAGARTY, C. J.—The defendants in moving against the verdict relied chiefly on the cases of *Siner v. Great Western Railway Co.*, L. R. 3 Ex. 150, and in Error 4 Ex. 117 (about 1868-9,) and *Lewis v. London, Chatham, and Dover R. W. Co.*, L. R. 9 Q. B. 66, decided in 1873, in which cases the majority of the Judges decided the question of negligence or no negligence as a matter of law. The former case was one in which the passenger got out when the train had overshot the platform.

Lewis v. London, Chatham, and Dover R. W. Co. was a case in which the plaintiff tried to get out beyond the platform, and as she stepped the train backed to come back to the platform, and the jerk threw her to the ground.

I would especially call attention to the clear and vigorous language of Kelly, C. B., in *Siner v. Great Western R. W. Co.*, 3 Ex., who was against the nonsuit with Keating, J. He very fitly describes the duty of the company as to providing proper means for passengers to alight, and that it must be a question for the jury whether

the plaintiff was or was not guilty of unreasonable want of caution in striving to get out at the risk of being carried past.

In *Robson v. North Eastern R. W. Co.*, L. R. 2 Q. B. D. 36, the plaintiff recovered, and Lord Coleridge notices that *Siner's Case* is commented on and distinguished in *Bridges v. North London R. W. Co.*, in Ex. Ch. L. R. 1 Q. B. 377, and in House of Lords, L. R. 7 H. L. 213.

The last case is the highest and fullest authority on the question of what is proper evidence to be left to the jury. There is a very full review of the authorities, and the opinions of the Judges were called for and given.

I especially refer to the very lucid judgment of Brett, L. J. The Lords decided that the case must be left to the jury.

In the case already cited, of *Robson v. North Eastern R. W. Co.*, Brett, L. J., says, in reference to *Bridges's Case*: "The House of Lords held that as the carrying of railway passengers was conduct in the ordinary affairs of life, the jury was the proper tribunal to decide. *Siner v. Great Western R. W. Co.* was decided in the heat of the controversy, and without saying that it ought to be overruled, I may say that it was decided by Judges who thought that these cases ought to be left to the Judge and not to the jury."

It appears to me that the judgment of the House of Lords in *Bridges v. North London R. W. Co.*, puts an end to a long controversy, not as to the law, but as to the mode of dealing with these cases. Some of the Judges seem to have been of opinion that these cases should as much as possible be withdrawn from the jury, and that the Court ought to say what was reasonable for the passenger to do.

The authorities are so fully noticed in these cases that their names need not be repeated.

We may also refer to *Cameron v. Milloy*, 14 C. P. 345, the judgment of Wilson, C. J.

In the case before us I think a *prima facie* case of

established. The conductor called out at the next station. The train, in place of what it should have done, to a full stop, apparently (the evidence clearly shewn) was only slowed. The several others anxious to alight crowded to the door of their car. Several got out on the platform, and I followed her husband, and, most anxious to get out, sprang out, the train being in motion.

ly left to the jury to say whether she had reasonable prudence in so doing, and whether by her imprudence she wholly brought the loss on herself.

B., said: "I am clearly of opinion that a rail-
are not entitled to expose any passenger to
of choosing between two alternatives, neither
could be lawfully called on to choose, namely,
on to Bangor, or to take his chance of danger
ut; and if they do so, the choice is made at
Siner v Great Western R. W. Co., L. R. 3 Ex.,

The jury here found that plaintiff had acted with
able imprudence and found for the defendants, I
t question their verdict.

have found otherwise, and I cannot say they are

point should a railway company be more careful
a matter of this kind. On a dark night they
the name of the next station, knowing that they
passengers for that station, and then either not fully or
ely stopping the train, so as either to give a safe
of exit, or to take care to warn passengers that
d determined to break their contract by not stop-
all.

latest case on this much debated question is *Davey*
Iron and South Western R. W. Co., 11 Q. B. D. 213,
a few months ago. The plaintiff must shew a
facie case of negligence causing the injury. But if
himself caused the injury by his own

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conduct, which was the sole cause of the accident, and
not any negligence on defendants' part, he cannot recover,
and may be nonsuited.

The last number of the "Weekly Notes," for December
8th, p. 201, mentions the affirmance of this judgment by
the Master of the Rolls, and Bowen, L. J., Baggallay, L.
J., dissenting.

ARMOUR and CAMERON, JJ., concurred.

Order nisi discharged.



[COMMON PLEAS DIVISION.]

DEVANNEY ET AL. V. DORR ET AL.

Assessment—Taxes when due—Agreement—Arbitration—Costs.

Under the Assessment Act, the assessment is for the purpose of designating the person to be charged, but no debt is due until the rate on the dollar is imposed, and the amount of taxes thus ascertained and fixed. By an agreement, dated 4th November, 1881, between one Q. and defendants', for the sale of Q.'s business, after a recital to the same effect, the defendant covenanted to pay, satisfy, and discharge all the debts, dues, and liabilities, whether due or accruing, contracted by said Q. in connection with said business, &c. Q. was assessed for goods sold under the agreement before the making thereof, but the rate was not imposed and the amount of taxes ascertained and fixed until May, 1882, thereafter.

Held, that there being no debt until the rate was struck in May, 1882, Q. when he sold the goods should have applied to have the purchaser's name inserted instead of his own, or have expressly provided in his agreement that the purchaser should indemnify him against this amount; and that the said taxes were not a debt contracted in connection with said business within the terms of the agreement.

By an order of reference the arbitrator was empowered to certify and amend pleadings and proceedings, and otherwise as a Judge at *nisi prius*, and costs of the reference, arbitration, and award were to abide the result of the award.

Held, that the arbitrator had no power to make any disposition of the costs, as they were provided for by the reference.

THIS was a motion by the plaintiffs, the executors of one Quinn, in pursuance of notice, to set aside the award made by the learned Judge of the County Court of the county of Lincoln, because:

1. The learned Judge should have found the plaintiffs entitled to the further sum, in addition to the sum found due to the plaintiffs, of \$41.37, being the amount of certain taxes paid by the testator on certain stock-in-trade sold to the defendant, the same having been assessed to the testator before he had sold the stock to the defendant, and thereby being a debt accruing due against the testator, and which the defendants contracted to pay under the agreement referred to in the pleadings and evidence in the cause.

2. The learned Judge had no power to make any disposition of the costs of this action, or to award by whom

and to whom the same should be paid, or in what manner the same should be taxed, inasmuch as the order of reference deals specifically with the costs, and the same can therefore be left to the determination of the taxing officer.

3. The learned Judge had no power to allow, or direct the taxing officer to tax to the defendants' solicitor and client costs of any nature, or under any circumstances, and the defendant is not entitled to have taxed to him any of his solicitor and client costs.

It appeared that Quinn was a tavern-keeper at St. Catharines, and in November, 1881, sold out his business to the defendants, taking from them the agreement set out in the judgment. Quinn then brought an action against the defendants to recover moneys paid by him for debts alleged to be due in connection with the liquor business. At the trial a verdict was taken for Quinn, the plaintiff, for \$270, subject to a reference by consent to E. J. Senkler, County Judge of the county of Lincoln. By the submission the arbitrator was empowered "to certify, amend pleadings, and proceedings, and otherwise as a Judge at *Nisi Prius*, and the costs of the action, and of the reference, arbitration, and award shall abide the result of the award." Quinn died pending the reference, which was continued by the present plaintiffs, who were his executors. During the reference a claim was made for a sum of \$41.37, alleged to be due for taxes in respect of the business, and the executors asked leave to add that sum to the amount claimed in the action, but the arbitrator refused to allow any amendment to be made. The arbitrator awarded \$29.70, in favour of the plaintiffs, and that the judgment for the plaintiffs do stand for that sum. The award then proceeded: "And I further award, certify, and direct that the said executors shall only recover Division Court costs, and the defendants shall be entitled to tax their costs as between solicitor and client, and so much thereof as exceeds the taxable costs of defence which would have been incurred in the Division Court shall on entering judgment be set off and allowed by the taxing officer against the said executors' Division

Court costs, and the amount of said judgment; and if the amounts of costs so set off exceeds the amount of the said executors' judgment and taxed costs, the defendants shall be entitled to execution for the excess against the said executors."

On November 6, 1883, *McClive* supported his motion, and referred to the Assessment Act R. S. O. ch. 180; O. J. Act, Rule 428; *Garnett v. Bradley*, 3 App. Cas. H. L. 944; *Russell on Awards*, 6th ed., 388, 392; *Ex parte Mercers Co.*, 10 Ch. D. 481; *Ex parte Hospital of St. Catherines*, 17 Ch. D. 378.

Aylesworth shewed cause, and referred to R. S. O. ch. 180, sec. 44; Municipal Act, R. S. O. ch. 174, sec. 317 *Ford v. Proudfoot*, 9 Gr. 478; *Bell v. McLean*, 18 C. P. 416; C. L. P. Act, R. S. O. ch. 50, sec. 347, sub-sec. 3 *Calden v. Gilbert*, 9 U. C. L. J. 213; *Elmore v. Colman*, 4 O. S. 321; *Morse v. Teetzel*, 1 P. R. 375; *Cumberland v. Ridout*, 3 P. R. 14; O. J. Act, Rule 246.

October 9th, 1883. WILSON, C. J.—The testator did not bring his action for the taxes of \$41.37. He did not claim them until the matter was before the arbitrator, when the executors asked leave to add that sum to the demand, but the arbitrator refused to allow them to do so.

The claim to the taxes is made upon the agreement between the testator and defendant of the 4th November, 1881. The testator by that agreement sold to the defendant his business, which he had carried on at St. Catharines, by which agreement it was recited that the defendants were "to pay off, satisfy and discharge all the liabilities now due and owing, or hereafter to become due and owing, incurred by the said party of the first part in the said business, either in his own name, or in the name of Stinson and Quinn." The defendants then covenanted in nearly similar language as the recital to "pay, satisfy, and discharge all the debts, dues, and liabilities, whether due or accruing contracted by the party of the first part in connection with the liquor

business carried on by him under the name of Stinson and Quinn, whether such debts are contracted in the name of the party of the first part alone or in the name of Stinson and Quinn, or otherwise howsoever."

The assessment for the year 1882 was made before the 4th of November, 1881, the date of the agreement. The rate was not struck until 8th May, 1882, and the amount of the taxes for that year were only then ascertained and fixed.

The plaintiffs as the executors of Quinn contend that the time the assessment was made was the time when a debt accrued against the testator, who was the party assessed, in respect of the goods which were sold to the defendants. The defendants deny the assessment created a debt, and say no debt arose in respect of the assessment until the year 1882, and not until the rate was struck in May of that year, and that the claim for taxes is not one covered by the agreement, and the arbitrator decided the point rightly in favour of the defendants.

In Worcester's Dictionary *Assessment* is said to be: "The sum assessed or levied as a due share, a tax, a charge, or rate: *Assessor*, 'One who assesses persons or property for taxation;'" and *Assess*, "To charge with any certain sum, as a due share, 'to tax,' 'to rate,' as 'to assess a tax.'"

"A tax or rate is (said to be) a general rule or rate by which a certain sum is raised" upon a given number of persons. The assessment is the application of that rule to the individual. * * It is also said, "The assessment is the valuation of the property which determines the sum to be paid by each individual."

The Assessment Act, R. S. O. ch. 180, speaks of the assessed value of property; the occupant shall be assessed; property liable to assessment, &c,

The assessment roll is to contain the names of all taxable persons resident in the municipality who have taxable property therein; the description and extent or amount of property assessed against each; value of property; total value of property.

The Act generally speaks of the land, personal property, and income "being assessed," and where and against whom it shall be assessed. Land may be assessed against both the owner and the occupant, and the taxes may be recovered from either. Sec. 20, mentions farmers' sons being entitled to be "entered, rated, and assessed" on the assessment roll. The assessor should give notice to every person assessed "of the sum at which the property has been assessed:" sec. 41.

By section 44, the assessment may be made between the first of July and the last of September, subject to revision; and it shall be finally closed by the 31st of December, "and the assessment so made and completed may be adopted by the council of the following year as the assessment on which the rate of taxation for said following year shall be levied."

Persons may appeal if wrongfully inserted on or omitted from the roll, or if undercharged or overcharged by the assessor on the roll. The roll as finally passed is to be binding on all parties concerned: secs. 56, 57.

By the Municipal Act, R. S. O. ch. 174, "the whole ratable property of the municipality according to the last revised assessment roll," is to be liable for the sum required to be raised; and by sec. 340, the council is to "assess and levy on the whole ratable property within the municipality, a sufficient sum" to pay all the debts of the year. The rate is to be calculated at so much on the dollar upon the actual value of all the property liable to assessment; and by section 347, the taxes or rates imposed or levied for any year shall be considered to have been imposed, and to be due on and from the first of January of the then current year, and end with the 31st day of December thereof, unless otherwise expressly provided for.

Looking at these enactments it appears to be clear that the object of the assessment roll is to describe the persons and property liable to taxation for the purpose of being taxed according to the value at which such property is assessed, and for that purpose the assessment so made is binding upon all persons concerned if not appealed from,

and if appealed it is binding upon them as the amount at which it is finally settled.

The assessment becomes binding, in my opinion, at and from the time the assessor gives notice of the assessment he has made to the respective parties, and for the amount of his valuation, or for such lesser sum as may upon appeal be fixed against the person or property; and the person assessed becomes *chargeable* for any sums ordered to be levied: R. S. O. ch. 180, sec. 88. And by section 93, in case of default in payment, the defaulter may be distrained upon; or, if they cannot be otherwise collected, they may be recovered as a debt due to the municipality: sec. 100; and taxes due upon land shall be a special lien upon the land: sec. 105.

The claim for taxes in respect of an assessment is enforceable after the lapse of fourteen days from the demand made by the collector for payment. There is no debt properly due or incurred until the rate on the dollar is imposed, for until then the amount to be paid is not known, although the person and the property assessed are charged from the time of notice of the assessment for such sum as may afterwards be rated against or imposed upon the value of the property so assessed.

The testator was rightly assessed for the property in question. If he sold the property before the time for appeal had passed, he should have applied to have had the name of the purchaser inserted instead of his own, or he should have provided expressly in his contract of sale that the purchaser should pay or should indemnify against such assessment or taxation.

He did not adopt either of these courses.

The question then is, do the words of the agreement, of real estate or covenant, include such taxes?

The assessment was a liability thereafter to become due and owing, incurred by the testator in the said business. It was also a claim covered by the word dues, accruing due, but it was not contracted by the testator, although it may have been in connection with the liquor business, and it

was not a debt within the terms "whether *such debts* are contracted in the name of the party of the first part alone, or in the name of Stinson and Quinn, or otherwise howsoever."

Reading the recital and covenant together I am of opinion the different expressions liabilities, debts, dues, and liabilities, and the other terms connected with these words, shew that it was debts alone which were provided for, and debts contracted in connection with the liquor business which the testator had carried on, and so the claim was not one which could have been allowed if it had been sued for, and the arbitrator was quite right in not allowing an amendment to permit the amount of taxes to be claimed.

Then as to the question of costs. The order of reference made at the assizes provided a verdict should be taken for the plaintiff for \$270, subject to the award to be made.

The arbitrator was empowered "to certify, amend pleading and proceedings, and otherwise as a Judge at *nisi prius*, and the costs of the action, and of the reference, arbitration, and award shall abide the result of the award."

The arbitrator awarded \$29.70, in favour of the plaintiffs, and that the judgment for the plaintiffs do stand for that sum. The award then proceeded; "And I further award, certify, and direct that the said executors shall only recover Division Court costs, and the defendants shall be entitled to tax their costs as between solicitor and client, and so much thereof as exceeds the taxable costs of defence which would have been incurred in the Division Court shall on entering judgment be set off and allowed by the taxing officer against the said executors' Division Court costs and the amount of said judgment; and if the amount of costs so set off exceeds the amount of the said executors' judgment and taxed costs, the defendants shall be entitled to execution for the excess against the said executors."

The plaintiffs' counsel contend the arbitrator had nothing to do with the costs, as the parties had by their consent order of reference agreed how they should be dealt with by making them abide the result of the award.

The arbitrator by the terms of the submission had no power over any of the costs in this litigation. The power he had of certifying as a Judge at *nisi prius* did not confer upon him by implication the power to award, or direct, or certify as to the costs against the express agreement of the parties. The like power as to certifying was given, but no one contended the arbitrator thereby acquired power over the costs against the plain provision of the submission that the costs of the cause were to abide the result of the award, or the result of the reference, as was there expressed, which was held to mean the reference so far as it related to the action: *Stevens v. Chapman*, L. R. 6 Ex. 213. The certifying cannot be extended to a matter excluded by agreement from the jurisdiction of the arbitrator.

I must therefore make absolute that part of the motion which applies to setting aside the award, by setting aside that portion of the award in and by which the arbitrator has assumed to dispose of and to deal with the matter of costs.

I must leave it to the taxing officer to tax the costs as he in his discretion may think fit, a most perplexing duty, for I have myself no positive opinion at present how I should tax them if I were required to decide the point, and the party complaining of the taxation can review the taxation if he desire to do so.

The plaintiffs having failed as to the taxes should pay that portion of the costs of the motion; and having succeeded as to the costs would be entitled to receive the costs of that portion of the motion. The one sum would probably balance the other. It will be more economical and convenient to the parties then to give no costs of the motion to either party.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

REGINA V. FLINT.

Keeping house of ill-fame—Evidence—32 and 33 Vic. ch. 82, D.—Statutory offence, or at common law.

On an application to the Divisional Court to quash a conviction made by the Police Magistrate, of the city of Toronto, against the defendant for keeping a house of ill-fame, there being evidence, as set out below, upon which the Magistrate could convict, the Court refused to interfere.

In the conviction the offence was stated to be against the statute in such case made and provided.

Held, that if not constituted an offence under 32 & 33 Vic. ch. 32, D., the reference to the statute might be treated as surplusage, and the conviction sustained under the common law; but that the reference to the statute might be supported, because the 17th section imposes a punishment in some respects different from the common law.

During Michaelmas Sittings of the Divisional Court of the Common Pleas Division, *Bigelow*, on reading the writs of *habeas corpus* and *certiorari* in this cause, the information, conviction, and evidence, and the papers returned with the writs, obtained an order *nisi* to quash a conviction made by the Police Magistrate, of the city of Toronto.

The prisoner was convicted for keeping a house of ill-fame against the form of the statute in such case made and provided.

The evidence so far as material, is set out in the judgment.

During Michaelmas Sittings, November 20, 1883, the case was argued.

Bigelow, for the prisoner, supported the motion. The conviction is against the form of the statute in such case made and provided. The Act 32 & 33 Vic. ch. 32, is the only one which refers to houses of ill-fame. Sec. 2, sub-sec. 6, provides that when any person is charged before a competent magistrate with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill-fame, or bawdy house, the magistrate may, subject to provision hereinafter made, hear and determine the charge in a summary way; and section 15 merely provides for the

jurisdiction of the Police Magistrate in cities, without the consent of the prisoner to be tried summarily. This Act is merely one of procedure, and does not create any offence. There is, therefore, nothing upon which to sustain the conviction. [WILSON, C. J.—Is not this an offence at common law?] There may be an offence of this kind and conviction at common law, but the evidence must shew that a public nuisance was created thereby, and there is no such evidence here. In any event there is no evidence to justify the conviction. The evidence does not shew this to be a house of ill-fame. It is only evidence of presumption or suspicion. He referred to *Bishop's Criminal Law*, 6th ed., vol. i., 1086, 1088; and *Belasco v. Hannant*, 31 L. J. Mag. Cas. 225, 227.

Fenton, for the Crown. There can be no appeal here on the evidence, as the magistrate's discretion is conclusive as to the degree and sufficiency of the evidence, and the credit due to the witnesses: *Paley on Convictions*, 6th ed., 132. There was sufficient evidence here upon which the Magistrate could convict. The statute clearly creates the offence, and is not merely one of procedure, and it has been so held by *Armour, J.*, in *Regina v. Clark*, 2 O. R. 523.

November 24, 1883. WILSON, C. J.—The prisoner was charged with keeping a house of ill-fame between 21st July and the 22nd of September, 1883, at No. 260 Adelaide Street, in the city of Toronto.

The case was before the Police Magistrate.

The evidence of Henry Raeburn was, that the defendant lived at the house mentioned, and kept a house reputed to be of ill-fame or assignation house.

Gerrard Stewart spoke of matters which related to a time prior to the 27th of May, and so not within the terms of the complaint.

Benjamin Pryce's evidence also related to matters which he deposed to as having happened before the time laid in the information.

Edward Vaughan is the only witness who spoke of mat-

ters within the time limited by the information. He said: "The house is reputed to be a house of ill-fame. I have seen men going in and out at all hours of the night till 4 a.m. I have seen women coming to the door to shew men out. I may have seen defendant. I am on the beat at the present time, and was on it from the 9th of July till the 19th of August, and from the 3rd till the 15th of September."

That is evidence of the truth of the charge which was made against the defendant, upon which the Magistrate might convict.

In *Regina v. Howarth*, 33 U. C. R. 537, at p. 546, *et seq.*, the cases are referred to shewing the way the Court on *certiorari* will deal with evidence given before the Magistrate.

The application fails therefore, for instead of there being no evidence against the defendant, there was evidence upon which he might rightly convict.

It was argued that the conviction was not sustainable because the keeping of a house of ill-fame is alleged to have been "against the form of the statute in such case made and provided," and there was no statute which applied to such an offence.

If the 32 & 33 Vic. ch 32, D. constitutes the keeping of a house of ill-fame a statutable offence, the reference to the statute is right; if it do not, the reference to the statute may be rejected as surplusage: 1 *Chitty's Criminal Law*, 2nd ed., 290. The reference to the statute may be supported, although it does not make this a statutable offence, because the 17th section imposes a punishment in some respects different from that of the Common Law.

I do not think it necessary to decide whether the offence is made an offence by that Act or not. The language does not seem to be what we should expect to find used if the Act constituted it a statutable offence. The language seems rather to be that such offence, and the other specified offences therein mentioned, shall be within the jurisdiction of the Police Magistrate, and shall be

tried and disposed of by him in the manner therein prescribed.

The conviction must be affirmed, and the motion dismissed, and the prisoner remanded to the custody from which she was brought

GALT, J., concurred. (a)

Conviction affirmed.

[COMMON PLEAS DIVISION.]

CORPORATION OF THE TOWN OF WELLAND V. BROWN.

Principal and surety—Collector's roll—Certificate—Entries on roll—Evidence—Commission, allowance of.

an action against sureties for a town collector for his default in paying over the sum collected by him.

It was (1) not necessary that the roll should be certified, but sufficient that it was signed by the town clerk; (2) that entries made by the collector on his roll in the discharge of the duties of his office of taxes paid to him were evidence against the sureties.

The jury, without any evidence to justify such finding, allowed the collector a commission of three and a half per cent. on the taxes collected by him.

It was held, that this amount could not be allowed, and that the amount against the sureties must be increased by this amount, less a sum of \$75, which appeared, by a by-law put in by leave on the motion, to be the proper amount of remuneration to the collector, on defendants' pleading a plea which would justify plaintiffs' in making such deduction.

THIS was an action tried before Morrison, J. A., and a jury, at Welland, at the Fall Assizes of 1883.

The action was by the town of Welland against the sureties of the collector, one Shea. The amount of the claim was \$650, for taxes alleged to have been received by the collector for 1882, and not accounted for or paid over to the plaintiffs.

The defendants by their pleadings admitted the appointment of Shea as collector for 1882, but denied that he was collector for any longer period.

(a) Argued before WILSON, C. J., and GALT, J., OSLER, J., having been appointed to be a member of the Court on his appointment as a Judge of the Court of Appeal.

They alleged that Shea never took the declaration of office; nor was a duly certified collector's roll furnished to him: that the bond was not authorized or required by by-law or resolution, nor received or accepted by the plaintiffs, and payment by Shea of all taxes collected during 1882.

The bond on which the action was brought was dated 14th November, 1882, and made by Shea, the collector, and the defendants as sureties; and the condition was, that the collector should truly and faithfully perform the duties pertaining to his office as collector, and faithfully pay over to the treasurer of the plaintiffs all moneys coming into his hands by virtue of his said office, according to the law relating thereto, and the regulations and requirements of the plaintiffs.

It appeared in evidence that a collector's roll, signed by the clerk, but not otherwise certified, was delivered to the collector prior to the making of the bond: that the time for returning the roll was from time to time extended until 1st of April, 1883: (See secs. 101, 102, R. S. O. ch. 180); and that the collector received large sums of money for taxes, and absconded without accounting for or paying over a balance of from \$455 to \$583.

The evidence as to the receipt of the moneys by the collector was (except as to one or two items) the entry of the various amounts by the collector in his own handwriting in a column in the roll prepared for the purpose. It would seem that if each ratepayer was called to prove his individual payment, about seven hundred witnesses would have been required.

After the collector absconded, another person was appointed to continue the levy and collection, who entered on the duties and returned the roll.

The jury, in reply to questions, found: (1). That the roll was signed or certified. (2). That there was no by-law approving of the bond. (3). That the bond was accepted by the town. (4). That it was so accepted after the 15th of December. (5). That the default occurred after the 15th of December. (6). That the collector was

entitled to $3\frac{1}{2}$ per cent commission on collections; and (7)
that the amount collected and not paid over was \$455.

The learned Judge, in entering the judgment on the find-
ings, deducted from the \$455 the $3\frac{1}{2}$ per cent. commissio
the amount collected, making the amount \$50.70, fo
which he directed judgment to be entered, and refused t
to certify for costs.

At the November Sittings of this Court, *Lash*, Q. C.
obtained an order *nisi* to set aside the verdict or find-
ing and judgment for \$50.70, and to enter a verdict o
finding and judgment for \$455, or for such other amount
the Court might think proper, with costs of suit, o
or such other order as to the Court might seem meet, o
the ground that the plaintiffs were entitled to a verdict
and judgment for \$455, upon the answers given by th
jury to the questions put to them by the Judge; and o
the ground that the defendants were not entitled to reduc
the amount of the default under the bond sued on as found
by the jury by any sum for remuneration for the service
of the principal in the bond, there having been no plea o
defence under which such reduction could be contende
for.

Since the trial a by-law of the plaintiffs was found
from which it appeared that the collector was appointed a
salary of \$75.

The Court received evidence of this by-law fixing the
salary or remuneration at \$75, the plaintiffs offering to
deduct such sum from the \$455, or other amount to which
the judgment might be increased, if the defendants would
amend their pleadings so as to claim the right to such
allowance.

During the same Sittings, December 14, 1880, *Osler*
Q.C., shewed cause. There was no properly certified rol
handed to the collector. There was no evidence of default
The entries on the books produced at the trial are no
evidence as against the sureties of the receipt of the taxes
by the collector. The payments themselves should have

been proved. In *Victoria Mutual Ins. Co. v. Davidson*, 3 O. R. 378, Burton, J. A., was strongly of opinion that during the lifetime of the principal the entries in the books cannot be evidence against the sureties. There was no by-law proved at the trial appointing the collector, and the plaintiffs cannot prove it now, as the other side seem to desire, nor is there any evidence to shew that the collector took the oath of office. There is also no evidence to shew that the amount of the indemnity was ever legally fixed. There is no by-law or resolution accepting the bond of indemnity. The jury were quite justified in allowing the $3\frac{1}{2}$ per cent.

Lash, Q.C., contra. The evidence shews that the roll was signed by the clerk, and this is all that is required. It is not necessary that it should be certified. There was also sufficient evidence of the appointment of the collector; but even if the collector received the taxes without any roll having been given him, and without having taken the oath of office, this would not constitute any defence to the sureties. The taking the oath of office is a duty cast upon the collector, which the statute imposes a penalty for not fulfilling, and the corporation is not bound to see that the collector takes the oath: *Corporation of Whitby v. Harrison*, 18 U. C. R. 603, 606; *Corporation of Whitby v. Flint*, 9 C. P. 449. There was clear evidence of default. This was a book kept by a person in a public office, and he was required to keep it by virtue of the statute, and to make the entries therein in the course of his official duties. The entries in the book by the collector in his own handwriting, and in the course of his duty, of the taxes being paid, are sufficient evidence, as against the sureties. This has been expressly decided in the case of *Middlefield v. Gould*, 10 C. P. 9. To hold otherwise would require some 700 witnesses to prove the various payments. The evidence given at the trial clearly establishes that the bond of indemnity was accepted by the defendants, and the jury have so found: *Judd v. Read*, 6 C. P. 362. There was no evidence to justify the finding of the jury that the collector

was entitled to $3\frac{1}{2}$ per cent. commission. The amount was allowed by the jury on the suggestion of the counsel for the defendants who during his address to the jury pointed out to them that they might relieve the defendants by allowing the collector a commission; and the commission of $3\frac{1}{2}$ per cent. was allowed because it was thought it would be sufficient to off-set the amount claimed. The by-law now put in shews that the remuneration of the collector was \$75, and the plaintiffs are quite willing to allow that to be set-off on the defendants putting in a plea which would justify their doing so.

December 15, 1883. ROSE, J.—There was no question or claim made at the trial by the defendants as to remuneration, until (as we were informed on the argument of the order *nisi*) during the address of the learned counsel for the defendants at the close of the case, when he pointed out to the jury that they might relieve his clients by allowing a commission. It is also suggested that the jury only failed in allowing sufficient to off-set the whole \$455, because of an error in calculation as to the sum $3\frac{1}{2}$ per cent. would amount to. The jury apparently were not unfriendly to the defendants, and made all allowances they felt justified in doing, and we may receive their verdict as to the amount retained by the collector without much doubt as to its correctness. Indeed, Mr. Osler, in his argument, did not suggest that so much had not been retained, but relied solely upon the want of legal evidence to prove the amount.

Mr. Osler, in shewing cause, confined himself to three grounds: (1) That the roll should have been certified. (2) That the entries by the collector on the roll were not evidence as against the sureties of receipt of the taxes by him. (3) That the plaintiffs never recognized the suretyship.

As to the first ground taken by Mr. Osler. The case of *Corporation of Whitby v. Harrison*, 18 U. C. R. 603, 606, decides that a certificate on the roll is not necessary to charge the sureties. There as here the roll was signed

only by the clerk, and not otherwise certified. This objection therefore fails.

As to the second ground, *Middlefield v. Gould*, 10 C. P. 9 decides that entries made by a clerk of a Division Court in the course of his business in books kept under the provisions of an Act for that purpose, were evidence against the sureties in an action brought to recover such moneys.

Mr. Justice Richards, in giving judgment, says at p. 14: "In the case before us the entries were made by the clerk from day to day in the discharge of the duties of his office, and the statute under which he was appointed requires the making of such entries. *On general principles*, therefore, I am of the opinion that entries so made can be received in evidence against the defendants. I think the book in which these entries were made comes fairly within the class of books referred to by Mr. Taylor, in his work on Evidence (2nd ed., sec. 1429), as kept by persons in a public office in which they are required, whether by statute or by the *nature of their office*, to write down particular transactions occurring in the course of their public duties and under their personal observation."

Reference to the section cited will shew further observations by the learned author to the same effect. We extract the following sentence as particularly applicable to this case: "Moreover, as the facts stated in these entries are of a public nature, it would often be difficult to prove them by means of sworn witnesses," referring to *Starkie* on Evidence, 3rd ed., vol. i., p. 230.

By reference to the Assessment Act, R. S. O. ch. 180, sec. 100, it will appear that a true copy of the roll certified by the clerk, so far as it relates to taxes payable by any person, shall be *prima facie* evidence of the debt in an action to recover the taxes from such person. It is clear, therefore, that if the taxes had been paid the roll should shew the payment, and therefore it is clearly the collector's duty to enter the payment on the roll opposite each entry, which would constitute such *prima facie* evidence.

See also sec. 101, requiring the collector to specify "in

a separate column on his roll how much of the whole amount paid over is on account of each separate rate." The entries of these payments to the collector are, therefore, clearly made by him "in the discharge of the duties of his office required by statute or by the nature of his office."

In our opinion the second ground also fails.

As to the third ground. The jury have found that the bond was accepted by the town, and the evidence, in our opinion, amply justifies their finding.

As to the remuneration or commission. The allowance of 3½ per cent. commission cannot stand. There was no evidence on which such a finding could be had. The defendants offered no evidence at all. The suggestion of counsel to the jury, however ingenious, cannot take the place of evidence, and the item must be disallowed. The by-law produced on the motion shews the proper allowance to be \$75.

The defendants should amend their statement of defence so as to distinctly claim the allowance of the \$75. On their doing so within two weeks it will be allowed.

The judgment should be increased to \$455, less the \$75, to wit, \$380, if the statement of defence be amended within the two weeks; if not, then to \$455 without the allowance.

The plaintiffs should have their costs of the action, including the costs of this motion.

The order *nisi* will be made absolute to increase the judgment accordingly, with costs as above.

WILSON, C. J., and GALT, J., concurred.

Order accordingly.

[COMMON PLEAS DIVISION]

IN RE BOTHWELL ELECTION CASE.

Contempt of Court—Newspaper articles—In pari delicto.

On an application on behalf of the respondent H. to an election petition for an order *nisi* calling on the defendant, his opponent at the election, to shew cause why he should not be committed for contempt of court for publishing articles in his newspaper, reflecting on and prejudging the conduct of the respondent and the returning officer during the currency of an election petition.

Held, on the materials before the Court, a *prima facie* case of contempt was made out; but as it appeared on the same materials that the respondent had attended and spoken at a meeting held for the purpose of approving of the conduct of the returning officer, and presenting him with a gold watch as a mark of such public approval, the applicant was also in fault, and the motion was refused.

H. T. Beck, on behalf of the respondent, J. J. Hawkins, moved for an order calling upon the Honorable David Mills, in the petition in the cause named, to shew cause why he should not appear before this Court to answer his contempt for writing and publishing certain articles in the *London Advertiser*, a daily newspaper, published in the city of London, criticizing and commenting upon the matters in issue and the proceedings in this matter, or why he should not stand committed for such contempt; and that the said David Mills do produce before this Court the fyles of the said newspaper, and do attend before this Court and submit to be examined touching the matters in issue on this application. He referred to *Tichborne v. Mostyn*, L. R. 7 Eq. 55, n.

November 19, 1883. WILSON, C. J.—This motion was made before my brother Galt and myself. We stated to the counsel making the application that however blamable and unwarranted many passages of the articles complained of may be, it might not be any disadvantage to the complainant to refrain from bringing the matter formally before the Court.

We are required, however, to deal with the matter upon the facts which have been laid before us.

We regret that such expressions should have been used, (assuming for the present Mr. Mills to be the author of them,) as:—(1) That he is "the cheated, but not the defeated member for Bothwell." (2) That "Hawkins, *the M. P. of Jim Stephens*," (the returning officer,) "has been cheated, &c." (3) That Hawkins. "the little Bothwell usurper." (4) "The conspirators, who returned Hawkins." (5) "From his" (Stephens's) "determination to betray an important public trust in the interests of his party." (6) "No one knows better than Mr. Stephens that he betrayed his trust," (7) "Mr. Hawkins was highly pleased to find the conspirators who had egged Stephens on to return him were still disposed to defend him." (8) "He," (Hawkins,) "knows his career as a member of the House of Commons will terminate with the judgment of the Court in the Bothwell election case." (9) "Why, Hawkins holds his seat by the grace and fraud of Jim Stephens, and it is surely the least thing that those who have profited by his infamy should seek to gild the somewhat discoloured character he has ever since been carrying around." (10) "No wonder that J. J. Hawkins waxed eloquent in Jim's praises, for he is M. P. by grace of notorious fraud, not by the votes of the community, and he knows it," (11) "Pity it is the *Mail* had not some of our contemporary's desire to draw the veil over the Bothwell outrage, and the presentation to returning officer Stephens, &c." (12) "He," (Stephens,) "was paid with our money, and sworn to discharge with impartiality the duties of returning officer, yet we find him a partizan among partizans, glorying apparently in his shame." (13) "The local conservative admirers of Jim Stephens, the notorious Bothwell returning officer, who cheated Mr. Mills out of his seat, have presented him with a testimonial in the shape of a watch and an address." (14) "Well, Mr. Stephens is the returning officer who made J. J. Hawkins M. P. for Bothwell, notwithstanding that he had the smallest number of votes of the two candidates Mr. Stephens has suffered a good deal lately by being pointed out as the man who did the infamous job, and feels

a little sore about gaining such notoriety, But his conservative friends of Bothwell have supplied a balm; they have presented him with an address and a gold watch.

* * Friend, your head-quarters are in the Bothwell conservative camp." (15) "Returning officer Jim Stephens, who stole the constituency of Bothwell from the electors and presented it to J. J. Hawkins, was dined and watched the other day. * * * J. J. Hawkins, by the grace of Jim Stevens, member for Bothwell, &c. * * * Such a gloating over rascality was never heard of in ancient or modern history." (16) "Is the gold watch not a reward for Mr. Stephens illegally returning Mr. Hawkins as a member for the riding, or is the Hon. D. Mills, who had a majority of votes of the electors. Then for the address, it fully endorsed the bold fraud perpetrated upon the majority of the electors and their representative Mr. Milla." (17) "The *Belleville Intelligencer* is one of the organs of the Tory party that has assiduously laboured to uphold the gross outrage that has been committed upon the rights and liberties of the people." (18) "We are glad our contemporary appreciates the position and acknowledges the fraud perpetrated upon the people of Bothwell. It will only be a question of a few weeks or months until the Courts have plucked the borrowed feathers from the political jackdaw, and hold him and the fraternity aiding him, up to public reproach. Mr. Hawkins no more deserves the title of M. P. while justice is delayed, than a thief caught in the act deserves to have that of 'honest man' attaching to his name after he is sentenced by the jury." (19) "Mr. Mills was elected by the people of Bothwell, but Mr. Hawkins was elected by the returning officer." (20) "The Bothwell usurper.—There is still another delay in the execution of the law which has been put in motion against the member of Parliament elected for Bothwell by Jim Stephens, the Tory returning officer." (21) "The delays of the Judges in fixing a time for trial have had the effect of retaining an impostor in a position which he was enabled to usurp through the unlawful action of a partizan returning officer.

No graver scandal has ever existed than the pitchforking of Mr. Hawkins into Parliament in defiance of the votes of the majority of the electors." (22) "Be this as it may, if the newspapers of the county had kept silent in the matter of Bothwell, where a returning officer made a defeated candidate a member of Parliament, they would have been false to their constituents, who look to them not only to applaud the right, but to denounce the wrong."

These, and other expressions of the like purport, have been published by Mr. Mills, as it is alleged, in the newspapers, from about the 3rd of July to the 30th of October, 1883. It is quite plain that such language applied to litigation in a pending suit in any of the Courts of the country, charging fraud and grave misconduct against the parties, or any of them, and asserting that one of the parties is not entitled to the subject of controversy, and that the other is entitled to it, and that the Court will deprive the one of the right and claim he is in possession of, and award it to the other party, has a tendency, even if it is not the direct object of the writer to prejudice the party assailed, and to induce him to be treated with suspicion, to prevent a fair trial being had, and to give the party in whose favour and for whose benefit all these articles have been published, an advantage and degree of credit and consideration he may not by the actual evidence be at all entitled to. It is an interference with the administration of justice; and it is conduct the more indefensible because these acts are done by a party to the litigation, for and in whose interest the publications are made. It is a matter for trial whether Mr. Mills had the majority of votes, and whether Mr. Stephens, the returning officer, did or did not act illegally against Mr. Mills, and whether Mr. Hawkins will or will not be deprived of his seat as a member of Parliament, and more especially whether the returning officer acted in the outrageous, fraudulent, rascally, infamous, cheating, partizan, shameful manner—for all these epithets are the words of Mr. Mills—and whether he betrayed his trust and was egged on by conspirators to make the return of Mr.

Hawkins as member, in place of Mr. Mills. Yet all these matters are argued upon and prejudged by Mr. Mills adversely to his opponent, and at the very time when Mr. Mills is pressing, as he says, for judicial investigation.

I do not say these articles will have the least effect upon the learned Judge who will be assigned to try this cause. Indeed I am sure they will not. But the question is, what is the tendency of such articles? and I say, the tendency is to interfere with a fair trial and equal justice to both parties, and if we are to infer the object of these publications from their tendency and the effect they are calculated to produce—and it is only reasonable to do so, for a party is presumed to have intended to do that which is the natural consequence of his own act—we must determine the object of Mr. Mills was to obstruct, as far as he could, the due administration of justice in this election trial.

That the publications will have a mischievous effect upon those who are more directly intended to be influenced by them, and who may be readily so influenced—that is, upon the electors of the constituency and the witnesses in the cause—is not at all improbable; but, as I have already said, it is not required that such influence should be shewn to have had actual effect, it is sufficient to bring the party within the penalty of the law that his acts have the tendency to operate injuriously to those who are litigants, by frustrating the due operation of the law, and defeating the impartial settlement of contested rights. That Mr. Mills has unquestionably done upon the case as it now appears before us; and if that were the whole case we should be obliged to grant the order *nisi* and require Mr. Mills to shew cause why he should not be proceeded against according to the terms of the motion; that he has so acted with a full knowledge of its wrongfulness, appears in the article in the *London Advertiser*, of the 5th of October, for he there says: “ Apart from the issues involved in the action of Mr. Stephens, we think that the presentation by Mr. Stephens’s friends is, to say the least of it, in very bad taste. The Courts have yet to say whether Mr. Stephens is guilty or

Not guilty of a serious offence, and to thus treat the accused is a contempt for the administration of justice. Believing as we do that any attempt by whatever party, Conservative or Reformer, candidate, returning officer or voter, to interfere in the slightest degree with the freedom of a people's choice in so important a matter as an election to Parliament, should be severely punished, we cannot help regretting that the friends of Mr. Stephens should have committed an act so lacking in good taste and decorum as this demonstration to one who has yet to be tried for one of the greatest moral offences known to the law. We are satisfied that the more thoughtful class of men of both political parties will agree with us in this feeling."

And again, in the *London Advertiser*, of the 6th of October, it is said:—"If the donors of this present had the least spark of honesty they would have waited until the Courts had given decision as to the legality of Mr. Stephens's course. If in his favour, there would be some grounds for their canonizing him as a political saint, we question if there is on record a more brazen or disgraceful act than this."

That is good preaching. Why was it not followed?

There is, however, something further to be considered. The Court may call upon any one, in the sound exercise of its judicial discretion, to answer for language of this kind, however it may have been provoked, and although no one else could, within the rule governing such a case, be heard as a complainant for relief. That power, however, the Court will exercise only in extreme cases, and only in protection of its own essential rights and dignity.

In the present case the Court is not, in our opinion, obliged to exercise that power for or on its own behalf, and of its own motion.

The Court is desired by and at the instance and on the motion of Mr. Hawkins to exert its powers on his behalf, and the question is, whether he is in the position of one who has a claim to the aid of the Court in protection of

The Court will not act at the instance of one who has published anything of the like nature as that he complains of, or who has done or participated in anything of the like kind which shews he is publicly maintaining his own cause, or the cause of any one identified with him, in opposition to the publications or conduct of the party he complains of.

Now it appears in the documents filed by the complainant Mr. Hawkins the sitting member, that about two months ago a public meeting was held in the village of Bothwell, within the constituency Mr. Hawkins at present represents in Parliament, for the purpose of presenting an address to Mr. Stephens, the returning officer at the election now the subject for trial, and of presenting him with a gold watch, as a mark of public approval of his conduct as such returning officer, and that an address to that effect, and a gold watch were then presented to and accepted by him, and that amongst those present was Mr. Hawkins, the present complainant, who also, it is said, spoke in favour of Mr. Stephens. We have not a full account of the proceedings of that meeting—I mean a copy of the address, and a statement of what was said by the respective speakers who are said to have spoken on that occasion. We know only the fact of there having been such a meeting, and that certain persons addressed the meeting, and what the general object of the meeting was from the mention of it in many of the articles produced as published by Mr. Mills. Now that was an improper act, publicly to approve of the conduct of the returning officer whose conduct is under judicial enquiry at the present time.

It was, in effect, just the like conduct, although not so culpable in degree, which Mr. Hawkins complained of against Mr. Mills. Upon the case, then, as it now stands, we do not think Mr. Hawkins can properly call upon us to exercise our powers on his motion and for his benefit, against Mr. Mills.

If, however, the full account of what was said and done at that public meeting, if presented to us, will relieve Mr. —

Hawkins from the position we think he occupies as a **party** excluded by his conduct from applying to put in **force** the powers of this Court at his instance, we shall **allow** him to delay his motion and to put in such further **material**; but we are inclined to think it may be better for **Mr. Hawkins** to consider whether after this intimation it **will** be prudent for him to proceed further, whether it will **not** be better for him to take nothing by his motion.

Mr. Beck mentioned the case of *Tichborne v. Mostyn*, L. R. 7 Eq. 55, n. I add *Onslow's and Whalley's Case*, L. R. 9, Q. B. 219 which was the case of speaking and conduct at a public meeting.

GALT, J., concurred. (a)

Motion refused.

(a) Argued before **WILSON, C. J.**, and **GALT, J.**, **OSLER, J.**, having
been to be a member of the Court on his appointment as Judge of
Court of Appeal.

[COMMON PLEAS DIVISION.]

FARGEY V. THE GRAND JUNCTION RAILWAY COMPANY.

Railway companies — Amalgamation — Enforcing decree obtained prior to amalgamation.

Part of the consideration for the right of way over plaintiff's land was that the company, the Belleville and North Hastings Railway Company, should construct a cattle pass under the railway, for the use of the plaintiff. The company refused to construct the pass, whereupon the plaintiff, on the 30th April, 1880, filed a bill in Chancery against them to enforce the agreement, to which the company on the 13th September, 1880, filed an answer, and on the 13th November a decree was obtained by consent to construct it on certain terms specified therein. In March, 1879, the Acts, 42 Vic. chs. 53 and 57, O., were passed, authorizing the Belleville and North Hastings Railway Company, and the defendants to enter into an agreement for amalgamation subject to the ratification and approval of a majority of the shareholders of said companies, at public meetings called for such purpose. On the 29th June, 1880, an agreement was entered into for the amalgamation of the two companies under defendant's name, which was on the same day ratified and approved of by the respective shareholders. The plaintiff had no notice or knowledge of the deed of amalgamation, or of its contents. On the 4th March, 1881, the Act 44 Vic. ch. 64, O., was passed, by sec. 1, of which the said deed of amalgamation was declared legal and valid, and that the two companies should be amalgamated and united under the defendants' name in the terms of the said deed. The decree not having been carried out, the plaintiff brought this action against the defendants to enforce it.

Held, that there was no complete amalgamation of the two companies until the passing of 44 Vic. ch. 64, O., so that the Belleville and North Hastings Railway Company had not ceased to exist when the decree was made, which was therefore legal and valid; and that the plaintiff was entitled to maintain this action to enforce it against the defendants.

THIS was an action brought to enforce the performance of an agreement which the plaintiff alleges the Belleville and North Hastings Railway Company entered into with him, as part of the consideration for the right of way for the railway across his farm, to construct a cattle pass from one part of his farm to another.

The cause was tried before Senkler, County Judge of the county of Lincoln, sitting for Wilson, C.J., at the Spring Assizes of 1883.

The facts are fully stated in the judgment of the learned Judge at the trial.

The following is the judgment of the learned County Court Judge:

SENKLER, Co. J.—This action is brought to enforce the performance of an agreement which the plaintiff alleges the Belleville and North Hastings Railway Company entered into with him (as part of the consideration for the right of way for their railway across his farm) to construct a cattle pass under their railway, to enable cattle to pass from one part of his farm to the other.

The plaintiff brought a suit in Chancery against the Belleville and North Hastings Railway Company, and obtained a decree (by consent) directing that company to construct the cattle pass on or before the 1st June, 1881, but the Belleville and North Hastings Railway Company having amalgamated with the Grand Junction Railway Company, the amalgamated company being now called The Grand Junction Railway Company, he brings this suit as the proper mode of enforcing the decree he has obtained.

The defendants admit that the decree was made as alleged, and that the statutes were passed allowing the amalgamation, but they deny that any liability was imposed upon them to construct the cattle pass, or perform the alleged agreement. They also contend that the suit in Chancery is still pending, and the plaintiff's right, if any, must be worked out there, and if the defendants are liable at all, they should be made parties to that suit, and that the plaintiff cannot by law proceed in this action.

The plaintiff's deed to the Belleville and North Hastings Railway Company of the right of way through his farm is dated 26th August, 1878, and is for the expressed consideration of seventy-six dollars, and contains no reference to the cattle pass or any agreement to construct one. The plaintiff, however, produces a paper signed by "A. F. Wood, for B. & N. H. R.," certifying that a part of the consideration to the plaintiff for the right to cross his place was that he should have a cattle pass, describing the place where it was to be, and stipulating that the plaintiff should furnish any timber on his place that would be suitable. This paper is dated 28th August, 1878, two days after the date of the deed.

The plaintiff swears that when he signed the deed it was agreed that this paper should be given him, but it was then overlooked and was given him two days after.

The plaintiff says that he made the bargain with Mr. Daily, the engineer of the railway: that Wood afterwards brought the deed and he refused to sign it until he was promised the writing. Wood is the attesting witness to the deed. Neither Wood nor Daily were called as witnesses, and no authority to make such an agreement was shewn to be possessed by either.

It was admitted that Wood was engaged in purchasing right of way, but not for whom.

The pass not being built, the plaintiff, on the 30th April, 1880, filed a bill in Chancery against the Belleville and North Hastings Railway Company to enforce the agreement. That company, on the 13th September, 1880, put in their answer denying the alleged agreement and the authority of any one to make it on their behalf, and also saying that it was impracticable to make the cattle pass at the point specified, but that they were willing to make an overground pass, which plaintiff refused, and contending that the deed contained the only agreement between the parties.

The cause was set down for hearing, and on the 13th November, 1880, upon the cause coming on, a decree was made by consent that the Belleville and North Hastings Railway Company should, on or before the 1st June, 1881, build or construct and maintain a cattle pass under their line of railway which crosses the plaintiff's land, (being the east half of lot number 4, in the 3rd concession of Huntingdon) of suitable dimensions to allow cattle and horses to pass in safety under the company's railway track and over their right of way, and as verbally agreed between the plaintiff and the company's engineer on the 2nd November, 1880; such cattle pass to be constructed opposite a certain ditch on the east side of a certain lane on the said land. The plaintiff was to furnish one-half the timber necessary to construct the pass, and to pay one-half the expense of putting the pass under the said railway, or furnish one-half the labor necessary; the plaintiff was to finish a ditch he was digging up to where the culvert was to be built; the company were to pay the plaintiff his costs of the suit.

The plaintiff says that before he filed the bill in Chancery, in the fall of 1878, the company did construct a sort of a pass but not large enough for ordinary cattle to pass through; it does not seem ever to have been contended that this was a performance of the agreement.

The plaintiff says that after the decree was made, in

the following winter he arranged with an officer of the company what timber each was to furnish, and he got out at was required of him.

On the 4th June, 1881, the plaintiff went to Mr. John Bell, the solicitor of the defendants, and shewed him his papers, of which Mr. Bell took a copy. He says he did this because he heard the road was to change hands. The road was never built.

On the 11th March, 1879, the Ontario Act, 42 Vic. ch. 53, was passed, by the 2nd section of which the Belleville and North Hastings Railway Company was "authorized and empowered to enter into an agreement for the amalgamation of the said company with the Grand Junction Railway Company, or any other railway company, or for selling, transferring or leasing its line of railway, or any part thereof, to any such company, together with the property, privileges and franchises belonging to it or to such part of its line as may be so sold, transferred, or leased, on such terms and conditions as may be defined by the agreement under the seal of the said companies entering into such agreement, which shall be ratified and approved of by a majority of the stockholders present or represented at a general meeting called for the purpose of considering such agreement, which shall be valid and binding on the several companies entering into the same after such ratification and approval."

On the same day, the Ontario Act, 42 Vic. ch. 57, was passed, by the 5th section of which the Grand Junction Railway Company was "authorized and empowered to enter into an agreement for the amalgamation of the said company with the Belleville and North Hastings Railway Company, or for acquiring the line of railway or any part thereof of said last mentioned company, or with any other railway company whose line may join or connect with the line of the said Grand Junction Railway Company, together with the property, privileges, and franchises," &c.; concluding in a similar manner to the section already quoted of the other Act.

Under these two statutes an agreement was entered into between the two railway companies (the Grand Junction Railway Company and the Belleville and North Hastings Railway Company) on the 29th June, 1880, whereby the two companies agreed that from that date "the Belleville and North Hastings Railway Company shall be united with and incorporated into the Grand Junction

Railway Company, and shall together therewith form one company, to be called the Grand Junction Railway Company," subject to the provisions of the above Acts, and the assent of the shareholders of the two companies, required by said Acts.

On the same 29th June, 1880, general meetings of shareholders of the two companies were held, and agreement ratified and approved of.

The minutes of proceedings at these meetings will be found on pages 10-11, and 51-52 of the pamphlet file called "Minutes and agreements of the Grand Junction Railway Company, from 8th August, 1878, to 16th June, 1880, and Belleville and North Hastings Railway, from November 23rd, 1877, to May 27th, 1880," and the agreement or deed of amalgamation will be found at length on pages 24-27 of the same book.

On the 4th March, 1881, the Ontario Act, 44 Vic. ch. 64, was passed, by the first section of which the deed of amalgamation, dated 29th June, 1880, above mentioned, is declared legal and valid, "and it is thereby declared and enacted that the said two companies are amalgamated and united under the name of the Grand Junction Railway Company, on the terms and subject to the provisions and conditions in the said deed contained; provided, that the Acts incorporating the said respective companies and the Acts amending the same, authorized such amalgamation and conditions."

It is provided in the deed of amalgamation that the several clauses of part five of the Imperial Act, 26 & 27 Vic. ch. 92, entitled the Railway Clauses Act, 1863, under the heading Amalgamation, and being sections 33 to 46 inclusive, except section 47, shall apply to and be read as part of said agreement.

Section 42 of the Imperial Act provides that all causes and rights of action or suit accrued before the time of amalgamation and then in any manner enforceable by, for or against the dissolved company shall be and remain as good, valid, and effectual for or against the amalgamated company as they would or might have been for or against the dissolved company affected thereby, if the amalgamation Act had not been passed.

Section 43 provides that actions or suits commenced or against the dissolved company, and pending at the time of amalgamation, shall not abate, discontinue, or determine but the same may be continued, &c., by or against the amalgamated company.

Although the Acts empowering the two companies to enter into the agreement for amalgamation came into force on the 11th March, 1879, the agreement or deed of amalgamation (as it is generally called) was not executed until the 29th June, 1880. The plaintiff had filed his bill against the Belleville and North Hastings Railway Company on the 30th April, 1880, about two months before the execution of the agreement. The answer, however, was not filed until the 20th September, 1880, when it was filed by the original defendant, and proceedings continued up to and including decree in the same way, no attempt having been made by either party to substitute the new company for the Belleville and North Hastings Railway Company.

The defendants in their statement of defence in the present case have admitted the obtaining of the decree in the Chancery suit, and have not alleged that it was in any way irregular or void. I understood Mr. Moss, however, in the present suit, to contend that after the execution of the amalgamation deed the suit should have been amended so as to make the new company (*i. e.* the present defendants) defendants in the place of the Belleville and North Hastings Railway Company. The plaintiff's counsel answered that he had no knowledge of the execution of the deed of amalgamation or of its contents: that it was not registered in any public place, and no publicity or notoriety was given to it, and that the defendants in the Chancery suit did not seem to consider it of any effect, as they answered in their own name; also that there was no such statute in force in Ontario as the Imperial Act 26 & 27 Vic. ch. 92, and that the introduction of the clauses from it into the deed could not affect third parties.

He also contended that there was no complete amalgamation of the two companies until the 4th March, 1881, when the Ontario Act, 44 Vic. ch. 64, was passed.

Mr. Thomas Kelso, who has been president of the Grand Junction Railway Company since its organization some twelve years ago, and was so at the time of the execution of the amalgamation deed, and is still the president of the amalgamated company, was examined before the Deputy Clerk of the Crown at Belleville, in this suit, and his examination was put in at the trial. He states that the same persons owned the controlling interest in both the Grand Junction Railway Company and the Belleville and North Hastings Railway Company, and that the object of the amalgamation was to consolidate the management and avoid the expense of the two managements.

* This is the only mode by which such proceedings, when they amount to a delegation or transfer of franchise, or special privileges, * * can be carried out : " *ce*, p. 727.

The two Ontario Statutes, 42 Vic. chs. 53 and 57, under the authority of which the deed of amalgamation in evidence purports to be made, authorized the two companies to enter into an agreement for the amalgamation of each with the other (or for dealing with each other or other companies in other ways) on such terms and conditions as may be defined by the agreement under the seal of the companies entering into the same, which shall be ratified and approved of by a majority of the stockholders present or represented at a general meeting called for the purpose of considering such agreement, which shall be *valid and binding on the several companies entering into the same* after such ratification and approval.

It will be observed that the only persons to be affected by the agreement are the companies entering into it. Not one word is said about third parties who may have dealings with either of the companies. It cannot be contended for a moment that the rights of third parties could be legislated away by the two companies under this agreement, or by means of it. See *Cayley v. Cobourg, Peterborough, and Marmora Railway and Mining Co.*, 14 Gr. 571.

It will also be observed that the power given to the companies is very general, being not only to agree to two amalgamate, but in the alternative to sell or lease, and not only to one another, but to deal with other companies if they choose, and upon such terms and conditions as may be defined by the agreement between them ; and yet no means are provided for giving publicity to the agreement, either by registration or publication or otherwise, as was provided with respect to the agreement under consideration in the case of *Cayley v. Cobourg, Peterborough, and Marmora Railway and Mining Co.*, referred to just now.

These considerations lead me to the conclusion that the Legislature did not intend that anything more than an agreement was to be entered into under the Acts of 1879, and that no actual and perfect amalgamation took place by reason of anything done under them, or at least that nothing of the kind took place as against third parties. I am confirmed in this view by the passing of the Act of 1881, 44 Vic. ch. 64, O., by which it is enacted that the two companies "are amalgamated and united under the

name of the Grand Junction Railway Company, on the terms and subject to the provisoes and conditions in the said deed contained," which would be wholly unnecessary if amalgamation had already taken place. This Act became law on the 4th March, 1881, and from that date the two companies were amalgamated.

I therefore think the decree obtained by the plaintiff against the Belleville and North Hastings Railway Company was valid and legal.

This decree, although made on the 13th November, 1880, was not to be enforced until the 1st June, 1881, or rather the Belleville and North Hastings Railway Company had until that day to comply with it, and before that day the amalgamation had taken effect.

The decree was not obeyed either by the Belleville and North Hastings Railway Company or by the Grand Junction Railway Company after the amalgamation, and the plaintiff now brings this suit as the proper mode of enforcing his claim, relying upon the case of *Attorney General v. Corporation of Birmingham*, 15 Ch. D. 423.

The facts of that case are not at all like the present, but the general principle is there laid down by the Master of the Rolls, at p. 425, that "a statement of claim or bill cannot be amended after final judgment. If it becomes necessary to enforce that judgment against persons who have acquired a title after it was made, an action must be brought for that purpose." An action having been brought in consequence of this judgment upon the decree which was the subject of the application in that case, it was dismissed on demurrer (*Attorney-General v. Birmingham Tame and Rea Drainage Board*, 17 Ch. D. 685) on the grounds that as the original action was brought for an injunction to restrain a nuisance, which had been granted, no new action could be brought unless it was shewn that the old injury was continued or a fresh one committed, which was not done, and also that no privity was shewn between the former defendants and the present ones.

I do not see that the decision of the Master of the Rolls in the first case is at all impugned by the second, or affected by it.

I therefore think that the plaintiff has taken the only course open to him to enforce the decree.

I think the present defendants are liable for the obligations of the Belleville and North Hastings Railway Company, under sec. 42 of the English Railway Clauses

Act, 1863, which is incorporated in the amalgamation deed. **Even** if this provision had not been made, I presume the **new** company would assume the liability of the old **companies**: *Cayley v. Cobourg, Peterborough, and Marmora Railway and Mining Co.*, 14 Gr. 571, already referred to.

I think the plaintiff is entitled to an order that the **defendants** do forthwith build or construct and maintain **a** cattle-pass in the manner directed in and according to **the** decree in the former suit, and upon the terms therein **mentioned**. The plaintiff is also entitled to thirty dollars **damages** for the non-construction of the cattle-pass, and to **his** costs of suit.

During Easter sittings, *Moss*, Q. C., moved to set aside the judgment entered for the plaintiff, and to enter the judgment for the defendants.

During the same sittings, May 29, 1883, *Moss*, Q. C., supported the motion. This action is quite unnecessary, for if the defendants are liable at all, the decree in the suit of the plaintiff against the Belleville and North Hastings Railway Company might have been revived against the present defendants by order of revivor. This is provided for by section 43, one of the sections of the Imperial Act 26 & 27 Vic. ch. 92, incorporated into the deed of amalgamation, and the O. J. Act Rules 384-6, and 494. As the suit could have been revived the **defendants** cannot be made liable for fresh damages and costs. **There** is no new liability against the defendants. The **plaintiff** relies on the case of *Attorney-General v. Corporation of Birmingham*, 15 Ch. D. 423. That is a very **different** case, being the case of a nuisance, while the present **is** a matter of contract. The decree against the Belleville and North Hastings Railway Company is of no effect, as the Belleville and North Hastings Railway Company had ceased to exist before the decree was obtained. The alleged agreement was never proved. It **was** not shewn that the persons who entered into it on behalf of the company had authority to do so: *Wood v. Hamilton and North Western R. W. Co.*, 25 Gr. 135; *Cameron v. Wellington, Grey, and Bruce R. W. Co.*, 28 Gr. 327.

G. D. Dickson, Q.C., contra. The case of *Attorney-General v. Corporation of Birmingham*, 15 Ch. D. 423, clearly shews that the action is maintainable. The fact that that particular case was one of nuisance makes no difference, as the principles there laid down are applicable to all cases, contract as well as tort. Whether, however, the proceedings under the decree should have been continued against the present defendants is only a question of practice, and cannot affect the rights of the parties. The Belleville and North Hastings Railway Company was an existing company at the time the decree was obtained, for no complete amalgamation took place until the passing of 44 Vic. ch. 64, O. The Belleville and North Hastings Railway Company themselves assumed that such was the fact, for they put in an answer in the name of the Belleville and North Hastings Railway Company, attested by an officer of said company. The agreement is sufficiently proved: *Cameron v. Wellington, Grey, and Bruce R.W. Co.*, 28 Gr. 327.

Moss, Q.C., in reply.

December 15, 1883. OSLER, J. A.—This was an action tried before Senkler, County Judge of the county of Lincoln, sitting for Wilson, C. J., at the Spring Assizes of 1883, for the county of Hastings.

The facts are very fully and clearly stated in the judgment of the learned Judge, and I therefore do not recapitulate them here.

In the view I take of the case it is unnecessary to consider whether the plaintiff could have successfully maintained an action upon the agreement to enforce performance of which he brought the action mentioned in the pleadings against the Belleville and North Hastings Railway Company, and in which action he obtained the decree sought to be enforced in the present suit.

The questions we have here to decide really are, whether, under the circumstances, that decree or judgment was regularly obtained; and, if so, whether it is enforceable against the present defendants by means of this action.

The decree was undoubtedly regular, unless the effect of deed of the 29th June, 1880, made *pendente lite*, and without notice to the plaintiff, was to destroy or extinguish corporate entity of the Belleville and North Hastings Railway Company. I am of opinion with the learned judge of the County Court that it did not have that effect.

What these two companies, the Belleville and North Hastings Railway Company and the Grand Junction Railway Company, were authorized to do, was "to enter into an agreement" for their amalgamation with each other, an agreement which was to be "valid and binding on the several companies entering into the same" after it should have been approved by their shareholders.

No provision was made for giving notice to the public, or protecting third parties interested in or having claims against the companies; and where the terms of a statute are not imperative, but as here optional or permissive, the fair inference is that the Legislature intended that the discretion as to the use of general powers thereby conferred should be exercised in strict conformity with private rights: *Metropolitan Asylum District v. Hill*, 6 App. Cas. 193, at p. 213.

The term amalgamation, as pointed out by Wood, V. C., in *Ex parte Bagshaw*, L. R. 4 Eq. 341, has no definite and positive signification. It is employed to denote loosely various operations in themselves widely different, which more or less completely work a transfer of corporate affairs from one corporation to another, and a merger of the former body into the latter.

The Imperial Act, 26 & 27 Vic. ch. 92, secs. 38 to 55 of which, inclusive, except sec. 47, are incorporated by reference only into the deed of amalgamation now in question, carefully defines the term in sec. 37, thus: "For the purposes of this Act, companies shall be deemed amalgamated by a special Act in either of the two following cases. (1) Where by the special Act two or more companies are dissolved, and the members thereof united and incorporated as a new company; (2) where by the special

Act a company is dissolved, and its undertaking transferred to an existing company, with or without a change in the name of that company."

In 38 Vic. ch. 48, O., by which the Hamilton and North Western Railway Company was authorized to amalgamate with the Hamilton and Lake Erie Railway Company, will be found an example of an Act containing well considered clauses for direct and perfect amalgamation.

Here the special Acts permit the companies to place their own meaning upon the term, and in pursuance of the Acts they entered into an agreement for their amalgamation, which agreement, having been approved by their shareholders, became valid and binding upon them as between themselves. They could not, however, by a secret deed of that kind destroy or prejudice the rights or remedies of third parties against either of them, unless the power of doing so had been clearly conferred upon them by the private legislation under which they assumed to act. The expression, "shall be valid and binding on the several companies entering into the same," appears to me to indicate rather that the two corporate bodies upon whom respectively the agreement should be binding still existed, than that as the result of it either of them should as to third parties be *ipso facto* entirely dissolved.

The passage of the subsequent Act, 44 Vic. ch. 64, O., supports this view. If the agreement operated a complete and effectual amalgamation of such a character as described in section 37 of the Imperial Act, that Act would have been unnecessary. I think there was no such amalgamation until it was effected by that Act; and therefore the decree of the 13th November, 1880, in the action against the Belleville and North Hastings Railway Company was, in my opinion, regularly obtained.

The next question is, whether this action is maintainable to enforce performance of the decree.

The case of *Cayley v. Cobourg, Peterborough, and Montreal Railway and Mining Co.*, 14 Gr. 571, referred to in the judgment of the learned Judge of the County Court,

authority, if one be needed for this proposition, that the new company must be taken to have assumed all the liabilities of the old ones to third parties; and if the former action had been pending in the sense of not having arrived at final judgment, when the amalgamation of the companies was effected, I have no doubt the name of these defendants might, on an *ex parte* application, have been substituted for that of the Belleville and North Hastings Railway Company: *Daniell's Chancery Practice*, 5th ed., p. 1374; *West Hartlepool Harbour and R. W. Co. v. Jackson*, 36 L. J. N. S. Ch. 189.

Nor am I prepared to say that if these defendants could be looked upon as the same corporation as the Belleville and North Hastings Railway Company under another name, the decree might not have been amended by substituting their new name for that in which they were sued. But if they are a new and different company with enlarged powers and an extended franchise, as I think they are, then the proper method of enforcing the decree against them is by action, for it is clear that you cannot, except in cases specially provided for, add parties to a cause on motion after final judgment, or enforce it against persons who are not parties to it: *Jeffreson v. Morton*, 2 Wms. Saund., ed. 1871, p. 12; *Mercer v. Lawrence*, 26 W. R. 506; *Campbell v. Holyland*, 7 Ch. D. 166, 169.

If the defendants had desired to avoid this action they should have complied with the decree, or have offered to consent to amend it by substituting their names as defendants, and to a reference as to damages sustained by its non-performance. But contesting, as they did, their liability under any circumstances, I think the plaintiff took the proper course to establish it in bringing this action.

The motion is therefore dismissed, with costs.

WILSON, C. J., and GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

MCPHERSON ET AL. V. GEDGE, THE SCOTTISH LANE
COMPANY AND MUTTON.*Mechanics liens—Suit by unregistered lienholders—Dismissal of—Right
registered lienholder to intervene.*

Under sec. 15 of the Mechanics' Lien Act, R. S. O. ch 120, suits brought by a lienholder shall be taken to be brought on behalf of all lienholders of the same class; and in case of the plaintiff's death, or his refusal to proceed, the suit may, by leave of the Court, be prosecuted by any lienholder of the same class.

A number of unregistered lienholders brought an action under the Act to enforce their liens against one G., which proceeded to the close of pleadings, and was then dismissed with the plaintiffs' assent. P., assignee of a registered lienholder, relying on the action, took steps to enforce his lien or to register a certificate within the 90 days under sec. 21. On being informed of the dismissal of the action, P. applied to be allowed to intervene as plaintiff and to prosecute the action on his own behalf.

Held, GALT, J., dissenting, reversing the judgment of Hagarty, C. J., which affirmed the judgment of the Master in Chambers, that the applicant should be allowed to intervene and prosecute the action; that the applicant was of the same class as the plaintiffs, in that they contracted with or were employed by G.

Lienholders "of the same class" are those who have contracted with the same person, whether their liens are registered or not.

Per GALT, J.—The applicant was not of the same class as the plaintiffs for he was a registered lienholder and came within sec. 21, where they were unregistered and came within sec. 20; and the 90 days having expired the applicant's lien was gone, so that even if the plaintiffs' suit were still pending the applicant could not have become a party to it.

DURING Easter sittings of the Court *F. Hodgins* moved by way of an appeal from the order of the Chief Justice of the Queen's Bench Division, made in Chambers on the 22nd of May, dismissing an appeal from the order of the Master in Chambers, on a motion before him under the Mechanics' Lien Act, to allow John Pearson to intervene in the suit, and to prosecute the same against the defendants or some of them, for his the said Pearson's benefit, on such terms as might be deemed just and reasonable; and for that order, if necessary, setting aside an order dismissing the action made on the 12th of December, 1882.

The papers filed shewed that an action was brought by twenty-one persons—not naming Edmund H. Graham, who assigned his claim to John Pearson, nor naming Pearson—against George Gedge and the Scottish Land Company, defendants, and Samuel S. Mutton as third party, under the Mechanics' Lien Act.

The action was by writ of summons, issued on the 1st of April, 1882. The united claims of the twenty-one plaintiffs amounted to \$266.53.

Graham registered his lien for \$121.80. He did not commence an action for his claim, as he intended to prove his claim in this action. Gedge was the contractor. The work was done on the property of the Scottish Company, and Mutton, on Gedge's failure as contractor, became his assignee.

The proceedings were not closed between the parties until the 29th of September, 1882, and a settlement was made with sixteen of these plaintiffs by Mr. Mutton, and on the 3rd of November following he sent a cheque for \$40.10 to Mr. Hodgins, solicitor for the plaintiffs, in settlement of the claims of the remaining five, and Mr. Hodgins, on the same day, wrote: "I agree this suit should drop. Each party will pay their own costs."

Mutton sold portions of the land on which the work was done to different persons; and he instructed his solicitors to procure the discharge of the different liens appearing on registry against the land; and an application was made on the 12th of December, 1882, for an order, which was granted, dismissing the action, and a certificate was thereupon procured from the registrar of this Court of such order, which certificate was registered in the registry office.

An application was afterwards made to the Master in Chambers to set aside the order dismissing the action [What papers he had before him did not appear], and he, on the 10th of May, 1883, gave the following judgment:

"I regard the order for dismissal in this case as regularly obtained, and in good faith.

Pearson and his assignor Graham had notice of this suit, and were aware that they were for their claim, but they did not take any step for dismissal. Pearson now seeks to set aside the order for dismissal. That dismissal proceeded upon a statement by the defendants of all the claims of the case, and was at a very early stage of the cause. I am not from the statement of the gentlemen who made it arose from a mistake that Pearson did not take steps to intervene. It was, however, the mistake of an agent, and I am not aware of any authority for setting aside the order for dismissal under the statute. He or his assignor might have made himself a party; and that state of things existed for several months, and I do not think it can be heard to open the suit where no fraud or deceit is practised against him.

"I think he stands in a different position, for the purpose of this motion, from a party to the suit. He has simply not availed himself of the right given him by the statute. This has been a very long time pending. I hesitated to dismiss the motion because I thought it was from unfortunate circumstances that Pearson did not, at the last moment, intervene; and he seems to believe that he has a just claim, and then it has, of course, stood over for the last two months.

But, finally, I do not think there is any practice to enable me to rescind the order for dismissal."

The case was then carried, on appeal, to the Chief Justice of the Queen's Bench, and he delivered the following judgment:

HAGARTY, C. J.—It seems the settlement of the suit was made fairly. The suit was dismissed, and the dismissal registered, as appears by affidavit, for the purpose of clearing the title.

I am of opinion that section 15 of the Act R. S. O., ch. 120, does not, after such settlement and dismissal, permit the applicant to have the suit revived and continued for benefit. I cannot believe that the law is in such a state as to permit such a proceeding. I can see no

reason for denying the right of the plaintiffs in such a suit to settle it, and allow it to be dismissed, and the register cleared of it as an encumbrance. This has been done here, and done fairly; and I think the suit is now non-existent, and no one can take further benefit from it.

I think the learned Master was right, and I dismiss the appeal, with costs.

The applicant then appealed to this Court.

In support of the motion the affidavit of Mr. Hodgins was filed. It stated that Mr. Hodgins was retained by Mr. Pearson on or about the 7th of November last in this matter: that he had no knowledge of Pearson's claim before that time: that on the 11th of November he wrote to Rose & Co. under the belief they were the solicitors for Mutton, saying, as the suit of McPherson and Gedge having abated, he proposed intervening in it for Pearson's benefit, unless his claim and interest, and \$5 for costs, were paid. Rose & Co. answered they would let Mr. Hodgins know what they would advise their clients to do.

On the 17th of November Mr. Coatsworth, one of the firm of Rose & Co., wrote Mr. Hodgins they could not advise their clients to pay.

Graham had been a sub-contractor, and was not a mechanic or labourer, and Mutton had paid Gedge fully for the premises which had been charged, and the former action had been fully settled.

Mr. Hodgins answered he should now intervene for Pearson.

A few days before the order was made dismissing the action he, Mr. Hodgins, was applied to by a clerk of Mowat, MacLennan, Downey & Langton, to sign a consent to dismiss the action, and he the deponent, to the best of his knowledge, informed the clerk he proposed to intervene, and could not sign a consent: that he was under the impression that Mutton, who had the substantial interest in the matter, was represented by Rose & Co.: that he made no further communication to Mowat & Co., and he thought

Mowat & Co. were desirous of closing up the suit so far only as they were concerned. Having noticed that an order was made on the 12th of December, dismissing the action, he wrote on the day after to Mowat & Co.: "As you were aware that I proposed to intervene on behalf of Graham in this suit, and as I had no notice of your application, I am not concluded by it. And in order that there may be no misunderstanding about it, I write you to say that should it be necessary, on my present application, to have your order rescinded, I will ask to have it done."

That the reason he did not more formally notify Mowat & Co. of his intention was, that he the deponent all alone believed that Mutton was represented by Rose & Co.

In answer to the affidavit of Mr. Hodgins, Mr. Langton, one of the firm of Mowat, Maclellan, Downey & Langton, solicitors for the Scottish Land Company, and for Samuel S. Mutton, made affidavit: that the title to the lands was being cleared to enable the company to complete the contracts they had made with various persons for the sale of the lands, and the buildings on them which Gedge and Mutton had put up. Mutton has settled all the claims of the plaintiffs in this action, and the action was dismissed in order to discharge the registered claims: that Mr. Hodgins refused to sign consent for the dismissal of the action; but the deponent did not know of any intelligible reason why he refused, unless it was that having ceased to receive instructions from the plaintiffs, he did not care to act any longer; that he was not aware until he received the notice of motion on behalf of John Pearson that he or Graham had any lien on the land. The order of dismissal was obtained in good faith.

Mr. Campbell, a clerk in the office of Mr. Hodgins, made affidavit that he informed the clerk of Messrs. Mowat & Co. that Mr. Hodgins would not sign the consent dismissing the action, because he intended to intervene on behalf of Mr. Pearson in the action.

At the Easter Sitzings of the Court, on the 7th and 8th **June**, 1883, *Hodgins* supported the motion. The affidavits **filed** shew that the parties to the suit had notice of the **applicant's** claim before the dismissal of the suit, and that **the** applicant refused to submit to such dismissal. The **applicant** is entitled under section 15 to intervene in this **suit**. At the time the plaintiffs commenced their action the **applicant** had the right to commence a suit on his own **behalf**, but, being a lienholder of the same class, he did not do so, relying on the plaintiffs' suit; and if he is not now allowed to intervene, it will work a great hardship upon him, **as** his right is now gone, the time within which he **could** bring an action having elapsed. The practice pursued **under** the Act is for one lienholder to commence a **suit**, **and** for the others to come into the Master's office and **prove** their claims. The plaintiff is not at liberty to **dismiss** his suit so as to affect the rights of the other lienholders, and without notice to them and giving them an opportunity of intervening, if they should desire to do so. **Unless** this was so no lienholder would be safe without **bringing** an action himself, and the object of the Act, **namely**, the preventing multiplicity of suits, would be defeated. The only case in which a dismissal would be supported against all lienholders is, when it appears that **the** ground on which the dismissal is made would in itself **constitute** a defence against all such other lienholders. He referred to *Dunn v. McLean*, 6 P. R. 156; *Leggo's Ch. Prac.* pp. 197, 484; *Daniell's Ch. Prac.*, 6th ed., vol. i., p. 233; *Barber v. Walters*, 8 Beav. 92, 97; *Bunting v. Bell*, Gr. 484.

Langton, for the Scottish Company and Mutton, contra. The **application** is one for the discretion of the Court. This **discretion** has been twice refused, and should not be **exercised** now. The suit was dismissed with the consent of **the** plaintiffs, and the applicant does not pretend to say that **there** was any fraud or misrepresentation. The practice **here** is the same as in ordinary creditors suits. The **plaintiff** is *dominus litis*, and he can dismiss the suit at

any time before decree. The creditors are in no way injured, as the other creditors can always bring a suit for themselves. Until decree other persons have no rights under the suit: *Pemberton v. Topham*, 1 Beav. 316; *Handford v. Storie*, 2 Sim. & Stuart 196; *Rathburn v. Burgess*, 17 C. L. J. N. S. 111; 1 *Smith's Ch. Prac.* 266; *Pemberton* on Revivor 3. Sec. 15 makes no difference, except in two respects, namely, in case of death, or a case of neglect or refusal to carry on the suit. The applicant does not come within either of these exceptions. The suit was settled on the 7th November. The applicant could have then brought a suit for himself, and the time for bringing an action had not then expired. The applicant consequently by his own laches has disentitled himself from suing: *Bunting v. Bell*, 23 Gr. 584. The lienholder has a special remedy given him the statute, and it was his duty as he did not bring a suit for himself, to see that the suit on which he relied was duly prosecuted. His remedy under the Act may be taken away, but his debt still remains, and the defendants are only in the position of sureties: *Phillips on Mechanics' Liens*, 2nd ed., secs. 43, 273, 278, 281, 378, 381.

Hodgins, in reply. The rights of lienholders under sec. 15 are very different from those of creditors in an ordinary creditor's suit, and therefore the cases referred to on the other side do not apply: *Atlas Bank v. Manhattan Bank*, 23 Pick. Mass. 488.

December 15, 1883. WILSON, C. J.—From the facts before us it appears that Mr. Hodgins was at first acting for the twenty-one plaintiffs named in the action, and not for Pearson or Graham. And on the 3rd of November, when he settled the action, it was for the twenty-one named plaintiffs, and not for Pearson or Graham.

He was first retained by Pearson on the 7th or 8th November, four or five days after he had agreed that the suit should drop, and each party should pay his own costs. Upon being retained by Mr. Pearson, he communicated

the action upon the ground that the solicitor who obtained such order had not stated the whole case ; that is, had not mentioned to the Master that Mr. Hodgins had since the 3rd of November, when he gave that consent, and refused to dismiss the action because a client of his who had retained him after that date had instructed him to prosecute the action for his registered claim, the Master would not have made the order without notice to Mr. Hodgins to shew cause.

But I do not find from any of the papers before us that such a case was made by Mr. Hodgins to the Master in Chambers, nor on appeal to the Chief Justice.

The case is before us to determine whether a registered claimant under the Mechanics' Lien Act, who has not commenced an action in his own right, either singly or along with other registered claimants, excepting in so far as the action of the other registered claimants is his action, can in an action brought by other claimants which has proceeded to the close of the pleadings, set aside the dismissal of that action which the plaintiffs in that action have assented to, and claim the right to prosecute it for his own benefit.

The statute R. S. O. ch. 120, sec. 15, enacts that : " Any number of lien-holders may join in one suit, and all suits brought by a lien-holder shall be taken to be brought on behalf of all the lien-holders of the same class ; and in the event of the death of the plaintiff therein, or his refusal or neglect to proceed therewith, may, by leave of the Court in which the suit is brought, on such terms as may be deemed just and reasonable, be prosecuted and continued by any other lien-holder of the same class."

And by section 21 : " Every lien which has been duly registered * * shall absolutely cease to exist after the expiration of ninety days after the work has been completed, or materials or machinery furnished, or the expiry of the period of credit, unless in the meantime proceedings are instituted to realize the claim under the provisions of this Act."

Under section 15: Is it necessary that every lien-holder should be named as a plaintiff in the suit brought against the defendant?

The statute says: "Any number of lien-holders may join in one suit, and all suits brought by a lien-holder shall be taken to be brought on behalf of all the lien-holders of the same class," &c.

By this language a suit brought by a single lien-holder shall be taken to be for the benefit of all, although the suit does not profess to be brought on behalf of any other lien-holder than himself, and even although the lien-holder who brings the suit has not registered his claim. All or any number of lien-holders may join in one suit, or a suit brought by one lien-holder shall enure to the benefit of all others..

It appears to me the suit which was brought in this case by a certain number of lien-holders did by the positive provision of the statute enure to and was for the benefit of Graham, although he was not named as a party suing. Any one lien-holder could in his own name carry on the suit from first to last, and all the others could come in by virtue of that suit and prove their claims. The act of registration of the lien is like being made a party in the Master's office in a creditor's suit after decree. I am of opinion that Graham or Pearson had by the operation of the statute instituted proceedings in due time to realize his claim, and that he is entitled to the benefit of these proceedings just as he would have been if he had been named as a plaintiff therein.

The rule in equity was well settled that a bill filed by a creditor on behalf of himself and of all other creditors is the bill of the actual plaintiff alone. "He acts upon his own mere motion, and at his own expense, and he attains the absolute dominion of the suit until the decree, and he may dismiss the bill at his pleasure. After a decree he cannot by his conduct deprive other persons of the same class of the benefit of the decree if they think fit to prosecute it. The reason of the distinction is, that before

decree no other person of the class is bound to rely up the diligence of him who has first instituted his suit, he may file a bill of his own, and that after a decree no second suit is permitted": *Handford v. Storie*, 2 Sim. & S., 196, p. 198; *Pemberton v. Topham*, 1 Beav., 316, at p. 318.

In *Woodgate v. Field*, 2 Hare 211, 214, the Vice-Chancellor said: "After the decree, every creditor has an interest in the suit; but the question is, whether the plaintiff until decree, is not *dominus litis*, so that he may do with the suit as he pleases. There is nothing to prevent other creditors from filing bills for a like purpose; and there is nothing more common than for several suits to exist together, and the Court permits them to go on together until a decree in one of them is obtained, because it is possible before the decree that the litigating creditor may stop his suit." See also *Holden v. Kynaston*, 2 Beav. 204.

Is there any, and, if so, what difference between an action brought by a creditor or shareholder for himself and an action brought by all others of the like class with himself, for a purpose common to them all, according to the general practice of the Court, and an action brought by one or more lien holders, and which action the statute declares "shall be taken to be brought on behalf of all the lien holders of the same class?"

In an action brought according to the practice of the Court the proceeding of the one plaintiff for himself and for the others in interest with him is one (1) brought upon his own mere motion; (2) at his own expense; (3) and he retains the absolute dominion of the suit until the decree, so that he may dismiss the bill at his pleasure: (4) the reason is, that no other person is bound to rely upon the diligence of the one who has instituted the suit, (5) and may file a bill for himself: (6) but after decree in one suit no second suit is permitted, (7) because after decree in one suit of this kind every creditor has an interest of which he cannot, without his consent, be deprived; and (8) other creditors may file their bills, as well as the original creditor.

who filed it for himself and for all other creditors, because they cannot prevent the original creditor from stopping or settling his own suit before decree.

Under the Mechanics' Lien Act the registered lien holders have, I think, not merely "an inchoate right which may be perfected by decree:" *Woodgate v. Field*, 2 Hare, at p. 214, but an actual, beneficial, and personal right and interest in the action brought by one or more of their class, although they may not be individually named as plaintiffs. (1) The statute declares such action shall be taken to be brought on behalf of all lien-holders of the same class; it is not, therefore, at the mere motion of one or more of them that he or they assume to act for the others. (2) And the statute also declares that in the event of the death of the plaintiff, or of his refusal or neglect to proceed with the action, the Court may give leave to any other lien holder to prosecute the same. (3) The lien holders are all persons having separate charges upon the same property. (4) The jurisdiction of the Court is determined by the amount of the claims filed as liens (sec 12). (5) And where there are several liens under the Act against the same property, each class of lien holders is to rank *pari passu* for their several amounts, and the proceeds at any sale shall be distributed amongst them *pro rata*, according to their several classes and rights; and they shall be respectively entitled to execution for any balance due to them respectively after said distribution (sec. 17.)

The purpose of the statute is to prevent multiplicity of actions for small claims, in which the costs would be enormously out of proportion to and in excess of the sums claimed; and these provisions, and the whole purpose of the Act, and the proceedings of and in the action, are so widely different from the ordinary creditor's action that the rules which are applicable to such latter actions cannot be held to govern this peculiar statutory remedy of these lien holders. That appears to have been the opinion of *Proudfoot, V. C.*, in *Bunting v. Bell*, 23 Gr. 584, at p. 590.

I am, therefore, of opinion that the claim of Graham,

which was duly registered and which became a charge upon the property in question, cannot be removed as a claim upon that property without the special order of the Court; and that the action which was pending was one in which he had a personal beneficial interest; and that it could not be dismissed without notice to him, or to the assignee Pearson, and without his consent, or without a judicial decision specially against his claim.

I think this rule is better than the one which prevails according to the practice of the Court on a creditor's bill.

But that which the Court has not done, or could not do, the Legislature has done. The Mechanics' Lien Act may be tolerated to some extent. As it now stands it is very oppressive upon the owners of property, for it, in effect, compels every proprietor building or improving his property to become his own paymaster, or to do his own work, and to make it perilous for him to trust to any one else whose business it is to attend to such matters, however inconvenient or impossible it may be for him to attend to them himself. Multiplicity of registrations against the proprietors' lands are vexatious enough, and it is some benefit to save him from a multiplicity of actions.

The consolidation of actions at the common law is a power long exercised by the Courts, and is a practice adopted to save unnecessary costs as far as it is possible to do so.

I am of opinion that the orders of the learned Chief Justice of the Queen's Bench and Master in Chambers should be set aside dismissing the action, and that the applicant should be allowed to intervene and prosecute the same for his own benefit, and for the benefit of any other lien-holder of the same class as himself whose claims have not already been paid or discharged, as it appears the plaintiffs named in the action already brought refuse to proceed therein. The leave now given to Pearson, being granted to him according to section 15 of the Act, upon the condition of saving the now named plaintiffs from costs of the said action which the defendants claim or may

claim against them, and from all future costs whatever, and if Pearson be made a party to the action, he will be responsible to the defendants for costs, and if he carry on the suit in the name of the present plaintiffs, he must give security for the defendants' costs.

The rule will be drawn up accordingly.

GALT, J.—This is an appeal from the judgment of the Chief Justice of the Queen's Bench Division dismissing an appeal from the Master in Chambers, who had refused an application to allow Pearson to intervene in the suit of *McPherson et al v. Gedge et al*, under the provisions of the Mechanics' Lien Act.

It appears that one Edmund H. Graham filed a mechanics' lien against one George Gedge, dated 31st March, 1882, which was duly recorded on 1st April following. This lien was on 14th June then next assigned to the said Pearson. No proceedings were taken either by Graham or Pearson to realize the claim under the provisions of section 21 of said Act, and of course no certificate that such steps had been taken was registered. A suit had been instituted by the said *McPherson et al v. the said Gedge et al*, under the 15th section of said Act, but Graham was not a party thereto, and a *lis pendens* had been registered on that day in the name of *McPherson et al v. Gedge*. This suit was subsequently dismissed in December, 1882, by the consent of all parties thereto.

Mr. Hodgins now wishes to have the order of dismissal rescinded, and to be allowed to intervene on behalf of Pearson, on the ground that before such dismissal, namely, in November, 1882, he had received instructions to intervene, and intended so to do, and that he had no notice of the order of dismissal until he saw it mentioned in a newspaper.

In my opinion the judgment of the learned Master in Chambers was correct, and consequently the judgment now appealed against should be affirmed.

By the 21st section above referred to: "Every lien which

It was no doubt the express intention of the Legislature when they passed this Act, which, however equitable in intention, is calculated to make one man pay another man's debt, that all persons dealing with the owner of property should have full notice of all claims against it. They have therefore enacted that the persons mentioned as having or being entitled to liens shall, if the lien is not registered, bring an action to enforce it within thirty days after it has accrued, and register a certificate thereof, or the claim shall absolutely cease to exist; or if the lien has been registered then to take the same steps within ninety days, otherwise it shall absolutely cease to exist.

I think the appeal should be dismissed.

OSLER, J. A.—This action was brought on the 1st of April, 1882, by a number of unregistered lien-holders as plaintiffs. The pleadings were not closed until the 29th September, 1882.

The applicant is the assignee of a registered lien-holder, who registered his lien on the day the action was begun, and who did not take proceedings actively to enforce it because he relied upon his right to prove it in the present suit. The plaintiffs and the applicant are lien-holders of the same class: that is to say, they all contracted directly with or were employed by the same person, for that is what is meant by this expression, which does not, as I think, refer to any distinction between registered and non-registered liens. Nothing appears to have been done in the suit for about a month (29th September to 3rd November), on which last mentioned day Mutton, the land owner, settled the claims of the plaintiffs by a payment of \$40.10, and their solicitor agreed that it should drop. A few days afterwards the same solicitor received instructions from the applicant to intervene and obtain payment of his claim. Notice was at once given to the solicitors who had up to that time acted for the defendant Mutton, and while correspondence was passing between them and the applicant's solicitor on the subject, the

latter expressly refused to give the solicitors of the other defendants, the Manitoba Land Company, a consent to an order dismissing the action, giving as a reason to the clerk who asked for it that he had been instructed to intervene in the suit on behalf of Pearson. I do not, however think that the clerk could have communicated anything more than the mere fact of the refusal to his employer, otherwise I can scarcely suppose the latter would have proceeded, as he did, to obtain, *ex parte*, on the 12th December, 1882, an order dismissing the action, which was registered on the following day.

The question is, whether, in these circumstances, the suit should be restored, and the applicant permitted to intervene and prosecute it for his own benefit.

The 15th section of the Mechanics' Lien Act, R. S. O. ch. 120, enacts that all suits brought by a lien-holder shall be taken to be brought on behalf of all the lien-holders of the same class; and that in the event of the death of the plaintiff therein, or his refusal or neglect to proceed therewith, such suits may, by leave of the Court, be prosecuted and continued by any other lien-holder of the same class.

I think that under this section registered lien-holders of the same class have a direct interest in such a suit, of which they cannot be deprived by the mere act of the plaintiff in settling his own claim and consenting to a dismissal. His action is, by the very terms of the statute, and quite irrespective of his intention, *taken to be* brought on behalf of all lien-holders of the same class, and they must therefore have a right at the proper stage to prove their claims in such action. The plaintiff cannot be *dominus litis* in such a case in the sense in which he is so prior to the decree in an ordinary class suit. If he was, it would be in his power to defeat the claims of other lien-holders who had refrained, in reliance upon their statutory right, from putting the owner or themselves to the expense of another action, by settling or dismissing his own suit after the expiration of the time limited for the commencement of theirs. He is doubtless free to settle his own demand, and

to refuse or neglect to proceed with his suit for that or any other reason; in which case it can only be proceeded with at the instance of other lien-holders by leave of the Court and on proper terms. Doubtless, too, the suit is liable to be effectually dismissed at the defendants' instance, for want of prosecution or other sufficient reason, not only against the plaintiff, but against other lien-holders, who, as well as the nominal plaintiff, are bound to see that it is prosecuted with due diligence if they mean to take advantage of it: *Bunting v. Bell*, 23 Gr. 584.

One question must always be, whether there has been *Laches* on the part of the person who seeks to intervene either in omitting to register his lien (for I do not now desire to decide that an unregistered lien-holder cannot take the benefit of such a suit), or in seeing that the suit has been duly prosecuted. The law imposes a serious burden upon the owner, and he is entitled to know as soon as possible what liabilities his property is charged with, and to have them removed.

If a plaintiff settles with all registered lien-holders after an action has been brought, I can readily understand that an application to intervene by one who is not registered would be received with disfavour. But I can see no *laches* on the part of the present applicant. He registered his lien, and the land owners had actual notice of it by search in the books of the registry office, as the affidavits shew. It is said he should have made himself a party to the suit, but how should he have done that? He would expect to be made a party after decree, and long before the suit was dismissed he was pressing his claim upon the owners through a firm of solicitors who professed to be, and who, no doubt, were acting for the defendant Mutton, and had also given notice of it to the solicitors for the other defendants in the action.

In such circumstances, with great respect for the learned Chief Justice and the Master in Chambers, I cannot think that the action should have been dismissed without notice to the applicant. Unless it is restored he will, without

any apparent default on his part, be deprived of his remedy : *Dunn v. McLean*, 6. P. R. 156 ; and he should, in my opinion, now be allowed to intervene and prosecute the suit upon the terms suggested by the Chief Justice of this Division.

With regard to section 21 it appears to me that it is sufficiently complied with by the registration of a certificate of the bringing of an action in which the claim *may* be realized, as was done in the present case. To hold otherwise would be to hold that each lien-holder must bring an action, which is precisely what the Act says he need not do.

Motion granted.

[COMMON PLEAS DIVISION.]

IN RE JARRARD

Extradition—Public book—Evidence—Alteration—Forgery—Extradition Act, 1877, 45 Vic. ch. 25, D.

The prisoner, who was collector of the County of Middlesex, in the State of New Jersey, kept a book in which to enter the payment and receipts of all moneys received by him as such collector, and which was the principal book of account kept by him. The book was purchased with the money of the county, and was kept in the collector's office, and was left by him at the close of his term of office; it was by statute open to the inspection of those interested in it, and contained the certificate of the county auditors as to the correctness of the matters therein contained.

Held, that the book was the public property of the county, and not the private property of the prisoner.

After the book had been examined by the proper auditors as to the amounts received and paid out by and through the prisoner as such collector, and a certificate of the same made by them, the prisoner, who was a defaulter, with intent to cover up his defalcation, altered the book by making certain false entries therein of moneys received and paid out, and changing the additions to correspond. Some of these entries were by the prisoner himself, and others by his clerk under his direction, but the clerk on finding that such entries were false changed them back.

Held, that this constituted forgery at common law, as well as under our statute 32-33 Vict. ch. 19, D.

Held, also, that under the Extradition Act of 1877, 40 Vict. ch. 25, D., it is essential that the offence charged should be such as if committed here would be an offence against the laws of this country. The offence, however, was also proved to be forgery by the laws of New Jersey.

A writ of *habeas corpus* in this case was issued, returnable before the Divisional Court of the Common Pleas Division; and a writ of *certiorari* was also issued to bring up all the papers and proceedings in this case before the said Court.

The facts were, that the prisoner was the collector for the county of Middlesex, in the State of New Jersey, one of the United States of America. He was in default to the extent of about \$36,000, in his accounts with the county. To conceal his default he made certain false entries in an account book of his transactions for and with the county, which were alleged to have been false and fraudulent entries, and to constitute the offence and crime of forgery.

The deponent further said that it was the custom of the finance committee of the board of chosen freeholders of the said county, and it is their duty under the law, at certain stated periods in each fiscal year to examine and audit the accounts of the receipts and payments by the collector of the said county of the public moneys of the said county and State for the period of time specified for the examination of such accounts: that the accounts of the receipts and payments of the public moneys of the said county were examined from time to time by the finance committee of the board of chosen freeholders of the said county during the period of time covered by said book journal: that the manner of conducting the examination would be generally and substantially as follows—deponent being present at and upon the occasion of said examination. He described that the receipts of Jarrard would be compared with the entries of receipts in the said book with which “he charged himself,” and the payments for which “he,” Jarrard, “gave himself credit in the said book” would also be examined, and they would “examine the vouchers produced by and on behalf of the said Jarrard of and shewing the payment by him of the items of payment.” Upon the committee being satisfied of the correctness of the items, “one of the committee would place a check mark upon the entry of payment in the said journal, which would shew the particular item of payment on which the check mark was placed had been examined and found to be correct by the committee, and that the said Jarrard was entitled to credit for so much money as was represented by said item: that the check mark so made would be the initial of one of the examining committee; the letter “E.” which is seen by an examination of the said journal, made 11th January, 1883, as specified, against the items for payments on the said journal as aforesaid, being intended to represent the name of John C. Evans, one of the said finance committee: that the said John C. Evans, John C. Norris, and A. N. Freeman, whose names are attached to the

cate in said journal, under the date of 11th 1883, having been, in fact, the finance committee and board of chosen freeholders on the said day: the said finance committee had completed their revision of the said book and vouchers produced by the said Jarrard, and had entered on the said journal the aforesaid certificate, and had respectively the same as aforesaid upon the 11th of January, and had adjusted and settled the accounts of the said Jarrard as therein contained and specified, and allowed to the said Jarrard such audits as he was entitled to as therein contained, and Levi D. Jarrard did, on or about the 14th of May, 1883, and prior to the delivery of the said journal to his successor in office, direct this deponent to make the following entries in the said journal, to wit:

On page 66, as of the date 8th September, 1882, item 270½, note paid in National Bank of New Jersey, \$1,000. And Jarrard then caused the posting of that entry to be altered from the original footing of \$1,149.74 to \$11,149.74.

On page 74, as of 12th September, 1882, item 308½, A. J. Desbrow, sheriff, on account of jurors' fees, \$1,000; and that Jarrard put the letter E against the said entry, to make it appear the committee had examined the entry and found it correct, and that it had the genuine voucher and check mark of the committee.

On page 160, as of 6th December, 1882, item No. 683½; J. Desbrow, sheriff, on account of jurors, \$1,000. These entries made \$12,000.

Then Jarrard directed the following entries to be made on the credit side of the account, as follows:

| | | |
|---|-------|----|
| 1.—Dec. 11th, 1882, received from A. J. Desbrow, sheriff, for taxes and costs.... | \$553 | 07 |
| 3.—July 1st, 1883, received from Ira Warne, collector of Madison township, on account of taxes..... | 2,500 | 00 |

| | | |
|-------|--|----------|
| 227.— | July 7th, 1883, received from C. C. Dally, collector of Woodbury township, on account of taxes..... | 3,000 00 |
| 227.— | Received from Wm. B. Mount, treasurer at Perth, Amboy, on account of taxes for the year 1882..... | 2,000 00 |
| 255.— | Received from W. B. Mount, treasurer of the city of Perth, Amboy, on account.. | 2,000 00 |
| 267.— | C. C. Dally, collector of Woodbridge township, in full for taxes. This sum was originally entered at \$1,000, and by Jarrard's instructions was changed to \$2,000. The first \$2,000 was paid by C. C. Dally, 1883; original entry increased by | 1,000 00 |
| 285.— | April 30th, received from W. B. Mount, treasurer of the city of Perth, Amboy, on account..... | 1,000 00 |

These sums make.....\$12,053 07

And which said sums amounting to \$12,053.07 were received by the said Jarrard "over and above the amount of money charged in the said journal as received by him at the time the journal was examined, approved and audited by the finance committee, on the 11th of January, 1883, and on the 8th of May, 1883."

The three items of \$12,000 on the credit side of the account balance the seven items on the debit side of the account, and leave a sum of only \$53.07 apparently against the prisoner.

The \$12,053.07 the prisoner actually received, but did not charge himself with until after the auditing, and the \$12,000 was inserted on the opposite side to counter-balance by false entries the first mentioned sum.

All these entries were made by Deshler on the 14th of May, 1883.

Deshler then stated "that after he had made the said several entries in said journal at the direction of the said Jarrard, this deponent, fearing from intimations that he then received that something was wrong in the accounts of Jarrard, as such collector, and having

seen the said Jarrard also falsifying the said entry of payments, the check mark of the said committee above specified, and the initial of John C. Evans to item 308½, the deponent did on the 14th of May, 1883, ask the said Jarrard for his vouchers for the said three entries or payments. Jarrard replied to the deponent: "Make one," meaning for the deponent to make such voucher. "I replied I would not. I said, 'No Jarrard, those entries can't stand.' Jarrard said: 'If you do not make the vouchers it will damn me.' I said: 'Mr. Jarrard, it don't make any difference to me whether it damns you or not. I do not propose to allow you to put me in a position to be damned myself.' I told him further: 'I never would have allowed him to have used me to make those entries, if he had not deceived me.' Jarrard left the office, and I have not seen him since but once at the post office. * * That the entry, C. C. Dally, collector of Woodbridge township, taxes in full, was originally entered \$1,000. Jarrard himself on the said day changed it to \$2,000. I myself afterwards changed it back to its original amount in his presence, and in his presence I wrote the words, "I refuse to carry out more than \$1,000." * * I afterwards entered against item 270½, "error," and changed the 1 in the \$10,000 into an 0. Against item 308½ I wrote, "refused to enter." And he explained the entries he made opposite the other items.

Richard Serviss, the successor in office of Jarrard, swore: "The journal exhibit A., is one of the public records of the payments and receipts of the public moneys of the said county."

John G. Garretson, chairman of the board of chosen freeholders of the county of Middlesex, and State of New Jersey, made the like statement as to the journal; and he added that the book was provided by the said board, and that it is the property of the said board, and is "the main and principal book of account kept by the said collector of the entry of payments and receipts by the said Jarrard as such collector."

During Michaelmas Sittings, November 19, 1883, *Osler, Q. C.*, and *N. Murphy* filed the writ and return thereto, and moved for the discharge of the prisoner. The question is, whether the offence charged here is forgery: that is, forgery according to our law. In the first place, the book in which the entries were made was the private property of the prisoner, and kept for his own convenience. It was just the same as if the prisoner, instead of keeping a book, had kept his account on separate sheets of paper. He had a right to make any alterations he pleased. Assuming, however, that the book was the public property of the county, did the alterations constitute forgery? To constitute forgery there must be an intent to deceive. There could be no intention to deceive until the book was handed over to the prisoner's successor in office, and before the book was so handed over the alterations had been corrected; and it makes no difference that the corrections were not made by the prisoner; they were made by a person occupying the position of his clerk. Moreover, the alterations themselves were never made by the prisoner, but by Deshler, the clerk. They referred to *Regina v. Marcus*, 2 C. & K. 356; *Re Lamirande*, 10 L. C. Jur. 280; *Re Hall*, 3 O. R. 331; *Re Windsor*, 6 B. & S. 522, 10 Cox C. C. 118.

E. Martin, Q. C., for the county of Middlesex, N. J. The book here was clearly a public book, just as books in a registry office are public books. The prisoner submits the books for audit. The entries in the book are audited by the board of chosen freeholders, and a written certificate given by them as to its correctness. The alterations are then made. This was the alteration of a public record. It was the alteration of a settled and audited account, and it was done clearly with the intent to deceive. It is not essential that the alterations should be made by the prisoner personally and in his own handwriting so long as it is done by another at the instance of the prisoner. Here the alterations were made by Deshler, the clerk, at the instance of the prisoner, and at his express desire. The

writing of the letter E opposite the entry 308½ to represent the initial letter of Mr. Evans's name, as shewing that the board of auditors had audited this entry, was the personal act of the prisoner. The alterations were clearly made with the intention to deceive and defraud, namely, to lead to the belief that the alterations were in the books when they were audited, namely, on the 8th of May. There was therefore clearly forgery committed on the 14th of May: *State, Young*, 46 N. H. 266; *Wharton's Crim. Law*, 8th ed., pp. 567-570, sec. 667; *Biles v. Commonwealth*, 32 Penn. 529; *The People v. Phelps*, 49 Howard N. Y. 462; *Brown v. State*, 18 Ohio 497; Extradition Act, 1877; *Williams*, 7 P. R. 275; *Re Browne*, 31 C. P. 484, 6 App. 386; *Re Phipps*, 1 O. R. 586, 8 App. 77. It is not essential to prove a *prima facie* case; and the Courts will always lean towards allowing extradition: *Regina v. Maurer*, 10 Q. B. D. 513; *Re Caldwell*, 5 P. R. 217; *Re Phipps*, 1 O. R. 586; *Re Reno and Anderson*, 4 Can. L. J. N. S. 315; *Re Gould*, 20 C. P. 154. The offence was clearly forgery by the laws of this country; but it is sufficient now if the offence be forgery within the laws of the country where the offence is committed. The whole course of the law on this subject is changed by the Act of 1877. The Act does away with all the distinctions at common law as to what does and does not constitute forgery; and all we have to do now is, to consider what is forgery under the statute: *Clarke on Extradition*, 2nd ed. 52; *Re Muller*, 5 Philadelphia R. 289; *Taschereau's Crim. Acts*, p. 40, *et seq.* He also referred to *Regina v. Banerman*, 43 U. C. R. 547; 15 U. C. L. J. N. S. 70; *Regina v. Smith*, 1 L. & C. C. 168, 9 Cox, C. C. 162; *Regina v. Moody*, 1 L. & C. 73, 9 Cox, C. C. 166.

Fenton, Crown Attorney, for the authorities of New Jersey. If the prisoner did not commit forgery on 14th May he committed no offence on that day, which is absurd, as the embezzlements were previously committed. In the debit item 267 \$1,000 cash received was fraudulently altered to \$2,000, and the footing of page 66 was fraudulently altered

from 1,149.74 to 11,149.74, and the initial "E" was fraudulently written to verify the forged entry of \$1,000 on page 74. All these are clear forgeries of an audited account, and done by the prisoner himself with his own hand. The evidence of Mr. Rice, the prosecutor of the Pleas, shews that they are forgeries by the law of New Jersey, and they are also plain forgeries here under the common law, being acquittances and receipts from the auditors to the prisoner: *Harrison's Case*, 1 Leach 180; *Re Hall*, 3 O. R. 331, 9 P. R. 373, 8 App. R. 31; *Regina v. Dodd*, 18 L. T. N. S. 89; *Regina v. Ritson*, 11 Cox C. C. 352, L. R. 1 C. C. R. 200; *Rex v. Forbes*, 7 C. & P. 224; *Regina v. Hill*, 8 C. & P. 274; *Regina v. Beard*, 8 C. & P. 143; *Luberg v. Commonwealth* (Pa.), 1 Crim. Law Mag. 779. By the second schedule of "the Extradition Act, 1877," the crime is to be construed according to the law of Canada at the date of the alleged crime: *Re Hall*, 3 O. R. 331; *Re Phipps*, 1 O. R. 586, 609; *Muller's Case*, 5 Phila. 289; and if the prisoner's offence had been committed in Canada it would have been forgery on 14th May, 1883, not merely under the common law but under the Canadian statute 32 & 33 Vic. ch. 19, D. See title, recital, and sections 26 and 45; *Re Hall* (above cited), and *Re Phipps*, 1 O. R. 586, 609, 8 App. R. 77. The forged entries in this public book of the board of chosen freeholders of Middlesex County were all uttered when made, but it is not necessary to prove any uttering: *Re Hall*, 3 O. R. 331; 2 *Bishop*, Crim. Law, 6th ed., 602, 603. He also referred to *State v. Seran*, 28 New Jersey, 519, which shews that in New Jersey all parties to forgery are held to be principals.

December, 15, 1883. [WILSON, C. J.—Upon the evidence it is quite manifest the book or journal referred to was the public property of the board of chosen freeholders or of the county, and was in no sense the private book or property of the prisoner. The inspection of the book and the action taken upon it in respect of the

accounts contained in it, and the certificates of the county officials, are sufficient to constitute it a public record. It is also a book, record, or document, as to which it appears by statute those interested in it are entitled to an inspection of it. That point being quite clear, there is unquestionably ample evidence to sustain the charge laid against the prisoner.

It is of no consequence that the entries were not actually made by the prisoner, but by the clerk, at the instance, and by the express desire of the prisoner. The act, in fact, of the clerk was the act in law of the prisoner.

There was one act among those charged as forgeries which was the personal act of the prisoner, that is, the writing of the letter E. opposite the entry 308½, to represent the initial letter of Mr. Evans's name, to indicate that the board of chosen freeholders had audited and approved of, and had checked it as correct by the letter E.

The change of the addition at the foot of the page on which the entry 270½ is made from \$1,149.74 to \$11,149.74 was also made by Jarrard himself.

The entries complained of in the book were such as might have deceived any one, and it cannot be doubted they were intended to deceive and defraud.

The Extradition Act now in force here is the 40 Vic. ch. 25, D., and by the second schedule of that Act "forgery, counterfeiting, or altering, or uttering what is forged, counterfeited, or altered," are among the therein specified crimes, and such crimes are declared by that schedule to be construed "according to the law existing in Canada at the date of the alleged crime, whether by common law or by statute made before or at the passing of this Act, and as including only such crimes, of the descriptions comprised in the list, as are under that law indictable offences."

By section 1, paragraph 2, "The term 'extradition crime' may mean any crime which, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in the second schedule to this Act;

and in the application of this Act to the case of any extradition arrangement, means any crime described in such arrangement, whether comprised in the said schedule or not." See on this point also, sec. 4, sub-sec. 2.

The statute and the "extradition arrangement" of 1842 are the powers under which extradition may now be ordered. The words of the arrangement are, that the proceedings for extradition shall, for the specified offences, be such "as according to the laws of the place where the fugitive is found would justify his apprehension and commitment for trial if the crime or offence had there been committed," and section 1, paragraph 2, of the Act of 1877, and sections 11, 12, 13, and the first part of the second schedule shew that such proceedings are to be taken under that Act as in the opinion of the Judge "would, subject to the provisions of this Act, justify the issue of his warrant if the crime of which the fugitive is accused or alleged to have been convicted, had been committed in Canada," or "charged with an indictable offence committed in Canada."

I mention this because I understood it to have been argued by counsel for the extradition that since the Act of 1877, it was no longer necessary the offence charged against the fugitive should be one which was an offence against the laws of this country if it had been committed here. That view of the law I take to be certainly erroneous.

I have said the evidence shews the offence of forgery is established against the prisoner. I desire to state my reasons for so deciding. I shall take the following entry in the book for the purpose: "Item 270½. September 6th, 1882. Note paid in National Bank, N.J., \$10,000." The entry was made by the prisoner's clerk at the prisoner's desire, and as an entry in the ordinary course of business in the office and official book used for that purpose.

The words of our Act 32 & 33 Vic. ch. 19, sec. 26, D., are, "Whosoever forges, alters or offers, utters, disposes of,

or puts of, knowing the same to be forged or altered, *
 * * * any account, book, or thing, written or
 printed, or otherwise made capable of being read, with
 intent in any of the cases aforesaid to defraud, is guilty of
 felony."

The entry referred to is upon the evidence a false entry. It is an account, or part of an account, in an account book kept by the prisoner as collector as aforesaid, shewing, or intended to shew, the state of accounts between the prisoner as such collector and the county for which he is such collector. It is also the falsification of the book in which the entry is made, and such entry was made with intent to defraud—that is, to obtain credit for the money represented by such entry in the accounts to have been paid; and by our statute the act is forgery, because it is expressly within the words of the Act.

The following is the evidence that it is forgery by the law of New Jersey:

Mr. Rice, who resides in New Brunswick, in the State of New Jersey, and is a counsellor at law of that State, and prosecutor of the Pleas of the county of Middlesex, in that State, says, in his deposition: "The crime of forgery is substantially the same in England and New Jersey. *

* The law of New Jersey still recognizes the crime of forgery." And in another deposition he says: "I have read the depositions referred to," that is, the depositions in this matter against the prisoner. "The facts stated in them, assuming them to be true, would establish the crimes of forgery and uttering forged paper, according to the common law of the State of New Jersey."

The offence is, upon that state of the law of this country and of New Jersey, established.

Independently of our statute the offence of forgery is established at the common law. The entry referred to, 270½, bears date the 6th September, 1882. By an audit made, by the authorized officials for the county of Middlesex at the date 11th of January 1883, all the entries in that book covered by the certificate, were examined and

approved of as correct, and the following certificate was given by the auditors :

“ We the undersigned members of the finance committee of the board of freeholders of Middlesex county, have examined the accounts of L. D. Jarrard, county collector, and compared the same with the vouchers and found them correctly stated, and also that we find the footing to be correct and errors rectified.

(Signed) J. C. NORRIS,
“ JOHN C. EVANS,
“ A. H. FREEMAN.

January 11th, 1883.”

The entry of 270½ was not in the books at the time of that audit, nor until the 14th of May, 1883; and the entry and all others made, which are alleged to have been fraudulently made and inserted in the book before that audit, were plainly made to falsify the account so audited; and such act constitutes the offence of forgery without any question.

The like observations apply to the other entries complained of, made at dates after the certificate of the 11th of January, and before the certificate of the 8th of May thereafter, but really made after the certificate of the 8th of May was given, namely, on the 14th of May—for such entries were made to falsify the account audited on the 8th of May, by representing and making it appear that the false entries complained of were really in the books at the time of that audit, and that they had been approved of by the auditors, in direct opposition to the fact, and with intent to defraud.

The charge of forgery is established, in my opinion, in the plainest and most unequivocal manner.

If the question had been whether the mere false entry, say of 270½, constituted forgery, I should have had more than doubt to overcome.

The cases of *The King v. Harrison*, 1 Leach 181; *Regina v. Smith*, 9 Cox 162, and *Regina v. Moody*, 1 L. & C. 173, are so very different from merely false entries

that they are decisions against rather than for the mere entry being forgery.

The case of *Regina v. Houseman*, 8 C. & P. 180, shews the difference between an act of forgery and a false entry or statement in writing.

There the prisoner was given by her mistress a tradesman's bill, and the money to pay it with, and she brought the bill back to her mistress with the writing upon it, "Paid sadler." The tradesman's name was Sadler; the name after the word paid was written with a small "s." The words "Paid sadler," were contended to be a mere memorandum made of what the prisoner had done. It is said in *Roscoe's Criminal Evidence*, 8th ed., 554, that Lord Denman left it to the jury to say whether the prisoner put the words there as a memorandum only or as an act of forgery, although the case in the report referred to does not state the matter so plainly in that way. Under the charge of the Chief Justice, that the account with the words in question upon it was a receipt for money because the prisoner produced it as a receipt, and that writing under the account "paid," with the name of the tradesman, "it will be difficult to say that it does not purport to be a receipt for money," the prisoner was convicted of the forgery.

There the mere writing complained of, if a memorandum only, would not have been forgery, although plainly it was a false memorandum or entry.

In *Rex v. Harvey*, R. & R. 227, "Wm. Chinnery, Esq., paid to tomson the som of £8, feb. 13, 1812." Held by the Judges not to be a receipt; "it was an assertion that Chinney had paid the money, but did not import an acknowledgment thereof."

Regina v. White, 2 C. & K. 404, is a very strong decision. It was there held by all the Judges that writing the name of a person, whose name the prisoner had no authority to use, and adding the prisoner's own name *per procuration*, was no forgery, because it was the mere false assumption of authority by the prisoner to sign it *per procuration*.

COOPER ET AL. V. THE CENTRAL ONTARIO RAILWAY
COMPANY.

Verdict subject to reference—Failure of reference—Setting aside verdict and granting new trial—Single Judge—Change of venue.

A formal verdict was entered at the Ottawa Assizes, subject to a reference, which failed through the omission of the arbitrators to enlarge the time. A Judge in a single Court set aside the verdict, and granted a new trial.

The plaintiffs resided in Montreal, and defendant's officers at Picton, and plaintiffs had some witnesses resident in Toronto. It appeared that Toronto was as easily accessible as Ottawa, and that no inconvenience would be occasioned by a change of venue to Toronto. Under these circumstances the change was directed.

THIS was an application to set aside a formal verdict entered at the Spring Sittings at Ottawa, subject (except as to a sum of \$8,000) to a reference, and also for a change of venue from Ottawa to Toronto.

The reference failed through the omission of the arbitrators to enlarge the time.

The sum of \$8,000 were paid after the order. The balance of the claim was about \$7,000, being, as it would appear, damages sustained by the plaintiffs in consequence of non-delivery by defendants of certain letters of credit, by which the plaintiffs were to obtain the money to enable them to perform the contract in question.

Arnoldi, in support of motion.
Marsh, contra.

December 21, 1883. ROSE, J.—The setting aside of the verdict is necessary to enable the plaintiffs to have a new trial. See *Russell* on Awards, 5th ed., pp. 714, 717, and cases there cited.

I was at first in doubt whether I could set it aside in single Court, but reading sec. 28 of the Judicature Act with secs. 281, 282, of R. S. O. ch. 30, and referring to *Hood v.*

Harbour Commissioners of Toronto, 33 U. C. R. 148, I think I may do so.

I think the plaintiffs should be relieved from the formal verdict and entry on the record thereof, and should have an order sending the case down for a new trial, the disposition of the cause having been delayed from the Spring until now through no fault of theirs, and the question in dispute, so far as appears, being one which may be conveniently tried before the ordinary tribunal.

As to the change of venue, it was admitted that as the plaintiffs resided in 'Montreal and the defendants' officers in Picton, Toronto was as easily accessible as Ottawa, and no inconvenience to defendants from a change of venue was suggested.

It appears that the plaintiffs have some witnesses in Toronto, and having in view the fact that the cause will be tied up until May next, unless the venue is changed, I think the plaintiffs should have an order to bring the case down for trial at the next Toronto Sittings.

I think the costs, including all steps taken under the order of reference and of this motion and proceedings thereunder, should be costs in the cause.

The order will therefore be as above.

Order accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. BERRIMAN.

Lord's Day Act—R. S. O. ch. 189—The Public Service.

Held, that R. S. O. cap. 189, which forbids the profanation of the Lord's Day by persons carrying on their ordinary business, does not apply to persons in the public service of Her Majesty, and therefore a conviction of a Government lock-tender on the Welland Canal, for locking a vessel through the canal on Sunday, in obedience to the orders of his superior, was quashed.

H. G. Scott, Q. C. moved to quash the conviction in this case which had been returned on *certiorari*.

The conviction set out that Berriman, a lock tender, was convicted before W. J. Fish, a justice of the peace for Welland, for that he did on the 15th day of July, 1883, the same day being the Lord's day, commonly called Sunday, he then being a lock tender on the new Welland Canal, exercise certain worldly labour, business, and work in his ordinary calling of lock tender upon the said Lord's day, by then and there locking through a tug or steam barge called the "Active," at lock number 21 of said new Welland Canal at, &c., the same not being a conveying of travellers or Her Majesty's mail by land or by water, and notwithstanding being a work of necessity or charity, contrary to the statute in that behalf, &c., &c., imposing a fine of \$2, and also \$3.25 costs, with twenty days imprisonment in default of payment, to be applied as directed by R. S. O. ch. 189, entitled "An Act to prevent the profanation of the Lord's day."

The information laid the charge in almost the exact words used in the conviction.

The defendant Berriman swore that he and others under orders from the Deputy Superintendent of the canal did lock this vessel through, and that the convicting justice was, when defendant was brought before him, notified of such orders.

Mr. Ellis, the canal superintendent, swore that he received

orders from the Department of Railways and Canals at Ottawa to pass this vessel and her consorts, and he accordingly gave orders therefor.

J. R. Cartwright and *McClive*, for the Attorney-General and the private prosecutor, respectively. The statutes to be considered are the Imperial Act, 29 Car. 2, ch. 7, and the Provincial Act, 8 Vic. ch. 45, re-enacted in Con. Stat. U. C. ch. 104 and in R. S. O. ch. 189. The first question is, whether the defendants are included in the classes of persons specified. The Act 29 Car. 2 provides, in sec. 1, that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day, or any part thereof (works of necessity and charity only excepted)." The persons mentioned are arranged in a descending scale, and are divided into the two classes of employers and employed: *Regina v. Cleworth*, 4 B. & S. 927. To the former class the Act 8 Vic. ch. 45, sec. 1, adds "merchant," and to the latter "mechanic." The latter class, which is alone in question in the present case, embraces workmen of all kinds, whether skilled or unskilled. Lock tenders clearly come within the general description of workmen or labourers: *Webster's Dict.*, "Labourer." The work of locking vessels through the canal is work of their ordinary calling: *Regina v. Whitnash*, 7 B. & C. 596, 601. As to the second point, that the Act does not apply to works owned by the Dominion Government. The Act is not an Ontario Act; but even if it were, in respect of property in the Province the Dominion Government is subject to the laws of the Province: *Re Toronto Harbour Commissioners*, 28 Gr. 195. Further, laws for the advancement of religion bind the Crown whether named or not: *Wilberforce* on Statute Law, 40, 41; *Hardcastle* on Statutory Law, 185 *et seq.* This law is for the advancement of religion: *Fennell v. Ridler*, 5 B. & C. 406; *Smith v. Sparrow*, 4 Bing. 84, 89. The matter is put beyond doubt by the words of the preamble both of the Act of Charles and of the 8 Victoria. The last

point is, that the work in question falls within the exception in the Act. The words of exception in the 8 Vic. are, "conveying travellers or Her Majesty's mail by land or water, selling drugs and medicines and such other works of necessity, and also works of charity, only excepted." In order to come within the exception as a work of necessity the work must be *ejusdem generis* with the works specified: *Sundiman v. Breuch*, 7 B. & C. 96. That case was a decision on the earlier part of this very section. That this general rule of construction is to be adopted here is shewn by the language used—"such other works of necessity, and also works of charity, only excepted." The second section of the Act of Charles expressly forbids the use of any "boat, wherry, lighter, or barge," upon the Lord's day, and it is not to be assumed that any provision of this Act, which is in *pari materia* with the 8 Vic., is repealed without clear words. The special prohibition in the Imperial Act is not repeated, because the exceptions made in the Provincial Act are intended to be the only exceptions, and the force of the exception could only be weakened by an enumeration of particulars. The necessity alleged here is only a pretended necessity. The law is framed in the public interest, and should be maintained unimpaired. Its design is to protect those who are likely otherwise, directly or indirectly, to be compelled to work on Sunday. The persons mentioned are those whose work, if carried on, tends to a general and open disregard of Sunday. The Act is a "salutary and useful enactment:" *Regina v. Daggett*, 1 O. R. 537, 545; and "is entitled to such a construction as will promote the ends for which it was passed:" *Fennell v. Ridler supra*. *Bethune v. Hamilton*, 6 O. S. 105; *Ex parte Middleton*, 3 B. & C. 164; *Phillips v. Innes*, 4 C. & F. 234, and *Regina v. Taylor*, 19 C. L. J. 362, were also referred to.

Scott, Q. C., contra. It is clear the statute does not apply to labourers on the public works of the Dominion. See *Maxwell* on Statutes as to what Acts do or do not bind the Crown. If the Act in question did, the singular

consequence would be that every employee could decide whether what he was told to do was or was not a work of necessity, shewing clearly that the Act cannot apply to this class of workmen. See 31 Vic. ch. 12, sec. 65, D., under which the Governor-in-Council may direct when canals shall be closed or opened; therefore the Lord's Day Act does not apply to the lockmen. There is no case as to what is a work of necessity either in England or here; but in the United States there is a collection in *Abbott's Digest*, 837. See also, *Megatrick v. Wason*, 4 Ohio 566; *Yonoski v. State of Indiana*, 41 Am. R. 614.

December 30, 1883. HAGARTY, C. J.—The case was very fully and ably argued before us.

No technical objections were pressed, and we understand our judgment is asked on the broad questions presented by this somewhat unusual proceeding.

The first section of the Ontario Act, on which the conviction professes to be founded, R. S. O. ch. 189, is: "It is not lawful for any merchant, tradesman, artificer, mechanic, workman, labourer, or other person whatsoever, on the Lord's Day, to sell or publicly shew forth, or expose, or offer for sale, or to purchase, any goods, chattels, or any other personal property, or any real estate whatsoever, or to do or exercise any worldly labour, business, or work of his ordinary calling, conveying travellers or Her Majesty's mail by land or by water, selling drugs and medicines, and other works of necessity and works of charity, only excepted."

The argument was, in a great part, addressed on behalf of the prosecution to prove that the defendant in his business of lock tender came within the description of persons mentioned in the statute, whether it was a worldly labour, &c., and several cases were cited.

We have nothing before us shewing with much clearness what a lock tender's duties really are.

We are told he was a lock tender, and on Sunday "locked a vessel through" at a named lock in the canal.

In a case in the Supreme Court of New York, *The People v. Lyons*, 5 Hun 643, defendant was charged with "tending lock" in the Delaware and Hudson Canal, on Sunday, and in his answer admitted "that he was personally engaged in tending lock on the Delaware and Hudson Canal, but that such tending was not contrary to statute or any law."

Held, on error, that the words "tending lock" did not of themselves purport to be servile labour not necessary, that to tend was to watch, to guard, to do things necessary, &c. and would rather imply a necessary work; and the conviction was reversed.

We were told on the argument that lock tender involved the opening and closing of the lock gates to let vessels pass.

We might naturally suppose, with the New York Court, that such an employment would include the necessary tending and guarding the rise and fall of the water, and maintenance of the canal, &c., &c.

But larger principles are involved.

That men must be employed in many capacities on a great work like the Welland Canal, and that in the very nature of the undertaking much work may and must be necessarily done on Sunday as well as other days, is beyond question.

The canal is vested in Her Majesty, and very large powers are conferred by Parliament on officers of the department to which its governance and management are entrusted.

We are called upon to decide, as pressed on us by Mr. Scott for the defence, whether the statute in question applies in any way to the work done on this canal, the property of the Crown, and wholly under the management of its officers.

Our interpretation Act declares (apart from the general rule of law) R. S. O. ch. 1, sec. 8, subsec. 46 "No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby."

Our Dominion Statute 31 Vic. ch. 12, may be referred to **as** to the control and management of such works as this **canal**; also 42 Vic. ch. 7, sec. 5, giving the Minister of **Ra**ilways and Canals "the management, charge, and direction."

I can find no trace in any English or Canadian report of **any** attempt being made to bring a Government servant or **labourer** acting directly under the orders of the Crown in **the** management or business of the department under this **Sunday** labour Act. No digest of cases that I have consulted suggests any such point.

Burn's Justice, Chitty's collection of statutes, with their copious notes, and other digests, &c., are equally silent.

I find a slight reference to such a view of the matter in *Wolton v. Gavin*, 16 Q. B. 54. The action was brought for **trespass** in arresting a man who deserted after having been **enlisted** by a gunner in the Royal Artillery, on a Sunday. **The** defendant, the officer of the guard, received and **detained** the plaintiff. It was objected that the enlistment **was** void, being on a Sunday.

Cockburn, Solicitor General, and Hill, were for defendants, and argued: "It would be very dangerous to apply **such** a restriction to a soldier at all. Is he not to mount **guard** on Sunday? The statute is applicable only to **persons** who are *sui juris*, and not to those acting under **the** direction of the executive power."

Lord Campbell says: "This objection seems to me to be **wholly** untenable. I think it would be monstrous to say **that** a soldier who is employed in the recruiting service **comes** within Statute 29 Car. 2, Ch 7. That statute **applies** to persons carrying on trades and occupations of a **civil** nature, and could not have in contemplation the **military** service of the country." He added also that enlisting **recruits** is not the ordinary calling of a soldier.

So in the case of the Post Office department. The statute **exempts** from its provisions the carrying of passengers and **Her Majesty's** mails.

But many persons have to perform services in this

department involving manual and other labour not necessarily in the actual carrying of the mails, but incident thereto. It could not be argued that the Sunday labour restrictions could apply to them.

Full powers are given by the statute to the officers placed at the head of this great department. See 38 Vic. ch. 7, D.

In a case of *Commonwealth v. Knox*, 6 Mass. 75, it was held not an indictable offence for the carrier of the mail, who was under contract with the Postmaster-General to carry same each day of the week, to travel with the mail on the Lord's Day.

Parsons, C. J.: "It may be said that the Postmaster-General is not obliged by law to contract with any person to carry the mail on the Lord's Day. This is true, but he has authority to make such contract; and there may be times, as in case of war or insurrection, when this authority should be exercised; and at all times it is within his discretion whether to exercise it or not."

We know that in England a strong section of the public has always been ardently advocating a more rigid observance of the Sunday, and many prosecutions have been instituted with that object. We also know that Parliament has been from time to time petitioned to compel a more stringent observance, and specially asked to prevent the labour of persons in the public departments. But we are not referred to any case in the books shewing the prosecution of any public servant for work done in a public department by order of his superiors, whose commands he must obey on peril of dismissal.

The absence of any such proceeding would strongly incline to the belief that it was because the statute was not applicable to such persons.

As to whether the Crown is bound when not named: *Maxwell*, 161 *et seq.*, 2nd ed. 161, at pp. 166, 167: "The Crown is not excluded from the operation of the statute where neither its prerogative rights nor property are in question." At p. 161: "It is presumed that the Legislature

does not intend to deprive the Crown of any prerogative right or property unless it expresses its intention in explicit terms, or makes the inference irresistible:" *Hardcastle* on Statutes, 180, *et seq.*; *Bac. Ab.*, Prerogative, E. 5.

Mayor of Weymouth v. Nugent, 6 B. & S. 22, contains much learning on the point. It was held that stone landed on the wharf for the work carried on by the Government were exempted from the tolls allowed by statute to be levied on goods landed there.

The remarks of Lord Blackburn and other Judges, in *Regina v. The Commissioners of the Treasury*, L. R. 7 Q. B. 396, as to Her Majesty and her servants, are instructive.

A great public work like the Welland Canal, built for national purposes as well as commercial, is by the wisdom of Parliament, with its administration, maintenance, and management, exclusively vested in the Crown, and its administration placed in the hands of high officials responsible to Parliament.

I have a strong opinion that with the Crown and its ministers must rest the uncontrolled right of direction to its servants, from the highest to the lowest, as to what work must be done, and when it must be done, in the management and user of the canal, and that the right to do such work is not affected by our Sunday legislation.

The Crown has to judge of its urgency and necessity.

If this principle do not prevail, then the working of departmental work might be seriously interfered with.

Each servant of a department who may have manual labour to perform to enable the department to do its work when the Government deemed it for the public service to act on a Sunday, would be liable to these penalties.

I think it never could have been intended that each Justice of the Peace should be the judge of the degree of urgency or necessity which, in the judgment of the officers of the Crown, warranted the execution of Sunday work.

We had occasion not long ago, in the *Queen v. Daggatt et al.*, 1 O. R. 537, to consider the question of Sunday

travelling, and the extent of the provision in the statute exempting the conveying of travellers and Her Majesty's mails.

Travellers may be lawfully conveyed along public highways and, with the permission of the Crown, along this canal. It seems clear that, on the roads, the toll-keepers, who may not be unlike lock tenders in their work, cannot be fined for opening toll gates on Sunday to travellers and mail carriers.

The use of roads on Sunday seems clearly recognized in Acts of Parliament, which prescribe exemptions from toll for persons attending divine service, and also, in some cases, when attending funerals.

We presume not even the prosecutors in the case before us would urge that the toll-gate men were liable to fine for such Sunday work.

This canal may be looked on as a highway.

The case of the *Caldier and Hebble Navigation Company v. Pilling*, 14 M. & W. 76, may be noticed on this point. By a local Act the company of proprietors of a public navigation were empowered to make by-laws for the good government of the company, and the good and orderly user of the navigation, and of the bargemen, boatmen, &c., carrying goods, and to impose reasonable fines, &c., for offenders. The company passed a by-law that the navigation should be closed every Sunday and no business done except works of necessity, and restraining the passage of boats, &c. It was a public or common canal for boats, barges, &c.

It was held, on full argument, that the company had no power to pass any such by-law, and that it was void.

Pollock, C. B., says: "Put this on the footing of a public road—a canal is a public highway. What right have they to put a chain across it?"

Alderson, B.: "Would the corporation of London be justified in putting a chain across the Thames to prevent steamers going up it on a Sunday?"

It is notorious that passenger steamers ply on the Wel-

and Canal. We may look upon their use of it as analogous **to that** of travellers conveyed along a public road.

The Government, as we are told, as a general rule, close **the** canal from midnight on Saturday to midnight on **Sunday**. This they have an undoubted right to do. They **have** equally the right to abrogate or vary this rule in **their** discretion. With their permission we cannot understand why passenger steamers or vessels cannot pass **without** any violation of the Sunday Labour Act.

The lock tenders opening and closing the gates can no **more** be liable on that statute than the toll gate-keepers on **the** highways.

When the Government officials direct them to pass any **vessel** or vessels on Sunday, I cannot see how the lock **tender** can be possibly expected to take on himself to decide **whether** his superiors acted rightly or not, and to refuse to **pass** a freight vessel or an empty vessel. The government may have good and sufficient reasons for directing **such** vessels to be passed on the Sunday. In the case **before** us the reasons are not explained.

The magistrate chooses to find that what the defendant **did** here was not a work of necessity or charity. In like **manner** if the superintendent directed gates to be opened or closed on Sunday because in his opinion it was proper or necessary for the well being of the canal, the convicting **justice** might give himself jurisdiction by finding that this **was** not a work of necessity or charity.

I think it was never intended to transfer the right to **determine** such questions, which the law has, as we think, **vested** in the discretion of the Government, to the opinion of a **justice** of the peace. This would be a curious shifting of legal responsibility.

There is an instructive article in 18 C. L. J. 190, **on** the subject of Sunday observance. It reviews many of **the** decisions, and especially notices the attempts of the **Courts** to soften the rigour of some of the state enactments, **and**, if possible, to prevent many absurd results which **would** follow a too rigid adherence to the letter of the law.

With the most sincere desire to see the day kept apart as much as possible from the exercise of ordinary worldly labours, as a most benign and fortunate intermission to the toil and weariness of the world, we cannot help fearing the inevitable injury that must result to its happy continuance, if a too rigid and practically impossible adherence to the letter of the law be insisted on under pain of fine and imprisonment.

The conviction must be quashed.

ARMOUR, J.—I quite agree in the judgment which has just been delivered, and I desire to express more distinctly what is in effect determined by it, viz., that no person in the public service, and acting therein, is within the terms of the first section of the Act, to prevent the profanation of the Lord's day, R. S. O. ch. 189.

CAMERON, J., concurred.

Conviction quashed.

[QUEEN'S BENCH DIVISION.]

HUGHES V. LONDON ASSURANCE COMPANY.

Fire policy—Submission to arbitration—Staying proceedings.

The defendants required the plaintiffs to proceed to arbitration to ascertain the amount of loss under a policy issued by the defendants in favour of the plaintiff, which contained the statutory condition as to reference to arbitration. The plaintiff was willing to arbitrate as to amount provided the defendants would admit liability for the loss. This the defendants refused to do.

The Master, affirming the order of ARMOUR, J., reversing the order of the Master in Chambers, that the defendants were not entitled to a stay of proceedings until the amount had been ascertained by arbitration.

THIS was an appeal from an order of Armour, J., in Chambers, under the following circumstances:

The defendants had required the plaintiff to proceed to arbitration under Statutory condition No. 16, to ascertain the amount of the loss alleged to have been sustained by him. This he was willing to do provided the defendants admitted their liability to pay the amount awarded, which, however, was declined, when the plaintiff at once commenced suit.

The learned Master on defendants' application stayed proceedings in the action till the determination of the arbitration.

On appeal his order was set aside by Armour, J.

The defendants declined stating what defence they intended to make to the action, and insisted on their right to have the amount first ascertained.

December 4, 1883. *J. B. Black*, for the appeal. The sixteenth statutory condition R. S. O. ch. 162, is part of the contract, and is an agreement for the reference of future differences within R. S. O. ch. 50, sec. 214. It is not necessary that the agreement to refer should include all matters in difference in the action. The stay of proceedings asked is only until the award is made, when the action may proceed as to matters not referred. The defendants in

this and the other two actions are willing that there should be but one reference. On the award being made the defendants may not raise any defence to the action, and therefore the defendants ought not to be put to the costs of defending the action pending the reference. *McInnes v. The Western Assurance Co.*, 30 U. C. R. 580, S. C. 5 P. R. 242, is in point.

G. H. Watson, contra. The agreement to refer must include all matters in difference, to come within R. S. O. ch. 50, sec. 214. The plaintiff is willing to consent to the reference if the defendants abandon all defences to the action. In the case of *Piper v. Dominion Fire Ins. Co.*, in Chambers, in February, 1880, not reported, a stay of proceedings was refused unless the defendants admitted their liability to pay the amount of the award.

December 29, 1883. HAGARTY, C. J.—It appears to me that in the present position of the parties we should not stay the action. The defendants have a clear right to have the amount ascertained by the reference. The plaintiff has also at least an equal right to proceed with his action.

If defendants admit their readiness to abide by the proposed reference, we should at once stay the action as wholly unnecessary; but I do not see, when they refuse to disclose the defence, if any, on other grounds, that we should prevent the plaintiff from proceeding with his suit.

When it is disclosed whether the defendants offer defence other than a dispute as to the amount of the loss, it will be quite time enough for the Court to decide whether justice requires the determination of the true amount before any other issue be tried.

We retain in our hands this power till we see when the interests of justice may require its exercise.

Issues may be raised which may require serious consideration whether justice between the parties may not render it proper to postpone either their decision till the result of the proposed reference be known, or, on the other hand, to leave the reference till after the other questions are decided.

We find that the Common Pleas has this Term refused to stay proceedings in another action brought by this plaintiff against another company on an insurance of the same property as in this case, and on the grounds, as we understand, similar to those urged here on plaintiff's part.

I think this motion should be refused, with costs.

ARMOUR and CAMERON, JJ., concurred.

Appeal dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

THE WATERLOO MUTUAL INSURANCE COMPANY V.
ROBINSON AND CLARK.

Evidence—Collateral Matters—Admissibility of—Pleading—Admissions by non-denial.

In an action on a bond against two sureties, the defendant R. set up the defence and gave evidence that his signature to the bond had been obtained by fraud. The evidence of his co-defendant, C., was tendered for the purpose of shewing that C.'s signature to the bond had also been so obtained, which was rejected as inadmissible.

Held, that the evidence of C. was admissible as shewing a fraud practised on him, with respect to the same instrument by the same person, and at or about the same time as the alleged fraud on R., and because it was confirmatory of R.'s evidence; and a new trial was ordered.

Per ARMOUR, J.—When a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue; therefore, it was competent for C. to deny the execution of the bond, his pleading not expressly admitting it.

THE plaintiffs in their statement of claim alleged that one Natrass became their agent: that he executed a bond to them in the sum of \$800, conditioned for the due payment by him to them of all such moneys as he should receive as such agent: that the defendants also executed the said bond as his sureties: that Natrass became in default to the amount of \$823.22: that Natrass fraudu-

lently represented to them that he was in default only to the extent of \$500: that Natrass delivered to the plaintiffs five promissory notes bearing date the 16th October, 1880 for \$100 each, with interest payable in four, seven, ten, thirteen, and sixteen months after date, made by said Natrass and endorsed by the defendants and one Fleming; and the plaintiffs relying upon the said representation and the validity of the said notes gave up the said bond: that after giving the said notes Natrass went to the United States: that the said notes turned out to be invalid by reason of their having been materially altered by Natrass after they were endorsed by the defendants: that the plaintiffs discovered after taking the said notes that Natrass was in default to them in \$823.22, instead of \$500, as he had represented: that the taking of the said notes under the said circumstances did not prejudice their right to have recourse to the bond: that if it should turn out that the notes were valid they claimed in respect of them.

The defendant Clark by his statement of defence said: (1) that upon a claim being made upon the defendants in the bond in the plaintiffs' statement of claim referred to for the alleged default of the said Natrass, it was agreed between the plaintiffs and the defendants that the plaintiffs should accept from the said Natrass his promissory notes for the amount set out in the fifth paragraph of the said statement of claim (\$500): that the defendants should endorse the said notes as sureties for the said Natrass, and that the same should when so endorsed be accepted by the plaintiffs as a compromise of the plaintiffs' claim, and in full satisfaction and discharge of all causes of action which the plaintiffs had or might have against the defendants on account of the said bond: (2) that the said promissory notes were made by the said Natrass as agreed, and were endorsed by the defendants, and were afterwards accepted by the plaintiffs in full satisfaction and discharge as aforesaid, and that the plaintiffs upon the delivery to them of the said notes by the said Natrass delivered up the said bond as cancelled in accordance with the terms of the said

agreement: (3) that after the said notes were endorsed by the defendants as aforesaid the said notes were and each of them was made void by being materially altered without the consent of this defendant, that is to say, by causing each of the said promissory notes to be made payable to the defendants and one John Fleming, instead of the defendants only, and by inserting the name of the said John Fleming in the body of each of the said notes as joint payee thereof with the defendants, and by causing the said John Fleming to endorse the said notes and each of them over to the plaintiffs as a joint payee and endorser with the defendants: (4) that being only a surety as aforesaid he became by reason of the said alteration released from the payment of the said notes and all liability thereunder: (5) that the plaintiffs having discovered the said fraud, and having proceeded upon the said notes after such knowledge, affirmed the said settlement, and could not now repudiate it: (6) that the plaintiffs having discovered the said alleged fraud, should have returned the said notes to the defendants and at once repudiated the said settlement, and that they were by their laches and delay debarred from any relief against the defendants.

The defendant Robinson pleaded originally the same defence as above pleaded by the defendant Clark, but before the trial obtained leave in Chambers to amend it, and did so by adding to it the following: (1) that he was induced to make the alleged bond by the fraud of Natrass: (2) that he denied that he ever executed the bond in the statement of claim mentioned; and he said that if his signature appeared thereon the same was obtained by Natrass therein named falsely and fraudulently representing that the same was only a recommendation for the employment of the said Natrass as an insurance agent, and under the belief of the defendant Robinson that the same was only such recommendation, and without reading over the same or understanding or knowing the contents thereof.

Issue.

The cause was tried before Cameron, J., and a jury at the last Spring Assizes at London, when the defendant was called as a witness, and having denied the execution by him of the said bond, and having given the following account of what took place between Nattrass and him on the supposed occasion of the execution of the said bond—"He came and said the Waterloo Mutual required a recommendation from some parties that were known in London and asked me if I would give him one, and I said yes I would, and he pulled out a piece of paper and asked me to put my name on it, sign it, as a recommendation; he had it all written out he said himself, and I signed it"—the defendant Clark was called as a witness and the following took place:

Q. "When did you first become aware of any claim being made by the plaintiffs against you?" A. "Well, it was about nine years after. When I got notice from the company I went to Mr. Nattrass and I asked him. Q. "It was about nine years after you signed some paper?" A. "Yes." Q. "Tell us the circumstances of signing the paper." A. "He came into my store." Mr. Clements: That is not admissible as to this defendant; there is no amendment." His Lordship: "I think, unless, of course, your amendment was allowed, and covers it, there is an admission on your pleadings of the making of that bond." Mr. Meredith: "In what way; by not denying it?" His Lordship: "Yes, by not denying it, and that it was satisfied by the giving of the notes, not disputing it at all: I do not know of any stronger admission that could be made than that." Mr. Meredith: "It is not a binding admission in the pleading." His Lordship: "I think it is." Mr. Meredith: "Then I submit I have the right to have the amendment now." His Lordship: "If it is a matter I have anything to say about, I think you have not." Mr. Meredith: "Your Lordship thinks you have nothing to say." His Lordship: "Yes I have: I have a right to consider all the circumstances about it, and I think the other circumstances displace this right." Mr. Meredith:

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"If your Lordship rules I submit." His Lordship: "I rule that it is not admissible on these pleadings if the objection is taken." Mr. Meredith: "I propose to ask the witness whether he ever executed the bond sued upon." Mr. Clements: "I object." His Lordship: "We will have to have this question settled sometime, and I suppose this may be as good a case as any to settle it in: I sustain the objection." Mr. Meredith: "I propose to offer the evidence as evidence on the part of Robinson to show a fraud committed by Natrass of the same character." His Lordship. "Does he know whether Robinson signed it or not?" Mr. Meredith: "I offer to show that there was a fraud of the same character committed upon Clark." His Lordship: "That is no evidence of it. I did not know that you represented Mr. Robinson, but we may as well take it from you as coming from the other side." Mr. Meredith: "It saves time." His Lordship: "I overrule this contention also." Mr. Meredith: "Does your Lordship not think it would be better to take the evidence, subject to the objection?" His Lordship: "As far as the admissibility of it is concerned, no, because I want the question to be settled once for all, whether it is so or not." Mr. Meredith, "I would rather some good strong corporation should settle it; the defendant is not in a good position to settle it: if your Lordship rules in that way Mr. Clark may as well step down and out." His Lordship: "If that is all you want to prove by him." Mr. Meredith: "As this matter is closed I would ask your Lordship what questions with regard to the defendant Clark you propose to submit to the jury." His Lordship: "I propose to direct the jury that the plaintiff is entitled to recover the amount of \$500, on the bond as against Clark."

The jury found a verdict for \$500 against both the defendants.

On May 23rd R. M. Meredith obtained orders *nisi* on behalf of each of the defendants for a new trial, on the ground of the rejection of this evidence.

On November 27th *R. M. Meredith* supported the orders nisi. 1. In no view of the facts can the plaintiffs recover. The defendants' liability upon the promissory notes was discharged by the alteration of them: *Reid v. Humphrey*, 6 A. R. 403; *Gardiner v. Walsh*, 5 E. & B. 83; *Halcrow v. Kelly*, 28 C. P. 551. The transactions by which the bond was delivered up and cancelled were at the most only voidable, not void. No action would lie upon the bond, at all events, until the plaintiffs had repudiated the settlement, and put the parties to it in the same position as before it was made: *Urquhart v. McPherson*, L. R. 3 App. Cas. 831; *Fraser v. McLean*, 46 U. C. R. 302. [CAMERON, J.—What do you contend the plaintiffs should have done here?] They should have elected to avoid the settlement, returned the notes, and paid back the money which they received. This money was paid by Nattrass's friends, the defendant Robinson contributing part of it. Herein the defendants' position is much stronger than that of the defendant in *Fraser v. McLean*, for there it was with the defendant's own property and means that he effected the settlement, and on that ground alone the learned Judge, Mr. Justice Armour, dissented. The objections to the plaintiffs' right to recover appear in their statement of claim, and so the judgment should be arrested. It would be useless to have a new trial. 2. The defendant Clark was clearly entitled to go to the jury on the question of the execution of the bond. It was not necessary to plead *non est factum*: Rule 147, Judicature Act; *Taylor & Ewart's Judicature Act*, p. 229. Rule 148 is clearly not applicable to a mere denial of the making of a deed or other instrument. If defendants are not entitled to judgment on grounds before mentioned there must be a new trial on this ground. 3. On the question of execution of the bond, see *Hiblewhite v. McMorine*, 6 E. & W. 200, and *Powell v. Duff*, 3 Camp. 181; and on the question of the cancellation or discharge of it, *Shep. Touchard*, 69-70; *Whitlock v. Waltham*, 1 Salk. 157; and *Bank of Upper Canada v. Widmer*, 2 O. S. 222. 4. According to the

testimony of the plaintiffs' witness Nattrass, the plaintiffs got all they bargained for, namely, his notes endorsed by the defendants. Their seeking additional security without the knowledge of the defendants was at their own risk. But in any case, the defendants being wholly innocent of any fraud, and being no parties to any mistake, there could be no revival of the bond, so far as they are concerned: *Ex parte Wilson*, 11 Ves. 410. 5. The testimony of the defendant Clark was clearly admissible in his co-defendant's behalf. He signed the alleged bond after his co-defendant, and so could have told whether there was a seal or not, whether the paper then had any semblance of a deed. 6. The other testimony rejected should have been admitted, relating as it did to important surrounding circumstances from which the probabilities of truth between the opposing statements might be gathered; not perhaps for the purpose of proving that the alleged bond was no bond, but rather on the question of the credibility of opposing witnesses, as corroborative of the defendant Robinson's testimony: *Taylor on Evidence*, 7th ed. pp. 78, 79, 296, 299, 310, and 311, paragraphs 63, 64, 316, 320, 335, and 336; *Blake v. Albion Life Assurance Society*, L. R. 4 C. P. D. 94. The evidence was also admissible on the question of negligence.

W. H. Bowlby, contra. The acceptance by the plaintiffs of the forged promissory notes, made by Nattrass, and purporting to be endorsed by the two defendants and one Fleming, was no accord and satisfaction of the bond now sued upon, because these notes were made void by alterations in them by Nattrass without the knowledge of either the plaintiffs or his sureties in the bond (who are the two defendants), before they were ever accepted by the plaintiffs, and before the bond was given up by the plaintiffs; and the bond having been surrendered in consideration and on the faith of getting good and valid notes for the balance due thereon, the plaintiffs can fall back upon the bond now that the notes they got for it have turned out to be forgeries. It is well settled that the

taking a bill void for alteration does not extinguish the original cause of action; *Atkinson v. Hawdon*, 2 A. & E. 628; *Sutton v. Toomer*, 7 B. & C. 416; *Noble v. Ward*, L. R. 2 Ex. 135, per Willes, J., at p. 138; *Roscoe's Nisi Prius*. Evidence, 14th ed., p. 399; *Petty v. Cooke*, L. R. 6 Q. E. 790; *Pritchard v. Hitchcock*, 6 M. & G. 151. The defendant Robinson's defence denying execution of the bond and saying that he signed it without reading it over, and believing it was a recommendation of Nattrass, is similar to the defence set up in *Dominion Bank v. Blair*, 30 Q. B. 591, where it was held that such a position was untenable in the case of literate parties like these defendants. The defendant Robinson's plea of *non est factum*, and his story as to the manner in which his signature was obtained to the bond, cannot be believed in view of the fact that when apprised of the default on the bond he did not deny its execution or repudiate the alleged fraud that had been practised on him by Nattrass, but instead of this disaffirming the bond he gave his notes for the balance thereon, and it must therefore now be held that he executed the bond: *Dawes v. Harness*, L. R. 10 C. P. 1. The case of *Brook v. Hook*, L. R. 6 Ex. 89, cited by defendants' counsel, does not support his contention, because the document was admitted on all hands to have been forged, and the written admission as to its validity was given to stop a prosecution for forgery. The defendants have elected to treat the bond as valid; and since they allege that the bond was obtained by fraud, and consequently only voidable, and not void, it is now binding. *Clough v. London & N. W. R. Co.*, L. R. 7 Ex. 34; *Morgan v. Universal Marine Ins. Co.*, L. R. 8 Ex. 197. The *Albion Life Assurance* case is clearly distinguishable from this. There the fraud sought to be established and intention of the agent could not possibly be proved any other way except by evidence of the collateral facts admitted; but such is not the case in the forgery charge upon Nattrass by the defendants here. As to the

tention that under Rule 148 plaintiffs were bound to prove the execution of the bond by the defendant Clarke, who has not denied its execution in his statement of defence, the Legislature could never have intended to introduce such an extraordinary and inconvenient practice; besides the denial of the bond was necessary "*for the purpose of making intelligible the grounds of defence,*" and so does not come within Rules 147 and 148 as to silence of a pleading not being an implied admission.

Meredith, in reply.

No one disputes the proposition that a good debt cannot be paid with bad money, but that proposition and the numerous cases cited to support it are not in point here. This case is not one of creditor against debtor. If the plaintiffs have any claim at all against the defendants it is only against them as sureties. The defendants are not bound to show accord and satisfaction. To put them in that position the plaintiffs must have a valid subsisting bond. The defendants say they never had any such bond, but, even if they had, it was cancelled, and the plaintiffs' remedy upon it destroyed. The plaintiffs can now only recover upon establishing, (1) the due execution of the bond; (2) such fraud or mistake in the cancellation of it as would entitle them to relief in a Court of equity; (3) that they have placed the parties in the same position as before the cancellation. There is no pretence that the defendants were parties to or had any knowledge of the alleged fraud or that there was any mistake on their part—that there was any mutual mistake; the plaintiff therefore cannot recover against the defendants, though against the other parties to the notes who sanctioned the alteration they still have a remedy upon the notes; or, they have a remedy by way of an action for deceit against the persons by whom they were deceived, if deceived at all. Neither *The Dominion Bank v. Blair, supra*, nor the other cases of that class are applicable. It may well be said that anyone who is literate, executing a deed knowing it to be a deed, ought not to be permitted to say that he was misled as to

its contents. But it is a very different thing when the same person signs his name merely to what is alleged to be a recommendation, and notes are afterwards added, and it is otherwise converted into the shape of a deed without consent or knowledge. Upon this question the case of *Brook v. Hook, supra*, is clearly in point. Both in regard to the bond and the notes the plaintiffs put it in Natrass's power to do the wrongs now complained of; indeed, it might be said, invited him to do them, if he could not in an honest way get what they required from him; therefore they should bear the loss without complaining: *Halcrow v. Kelly, supra*. It cannot be seriously contended that Rule 341, Judicature Act, applies here, for the defendant Clark was not allowed to go to the jury at all, and it cannot be said that Clark's testimony alone in his co-defendant's behalf might not have changed the minds of the jurors; so that at the least there must be a new trial upon the whole case.

Dec. 29, 1883. ARMOUR, J.—Two questions are presented for our consideration; first, was it permissible to the defendant Clark, on the pleadings as they stood, to deny that he executed the bond sued on? And, second: Was the fact that his signature had been obtained to the bond by a similar fraud to that which, according to Robinson's evidence, had been practised upon him in procuring his signature to it a fact relevant to the issue raised by Robinson as to the execution of the bond by him?

The first question is determinable by the rules of pleading introduced into all the Courts by the Judicature Act, and substituted for those heretofore used in the Court of Chancery and in the Courts of Common Law, and the following are the rules and parts of rules bearing on the question.

Rule 128. "Every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved."

140. "If either party wishes to deny the right of any other party to claim as executor or as trustee, or as assignee in insolvency, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically, or the same will be taken to be admitted."

141. "Where a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise."

146. "Admissions are, in all cases where it is practicable, to be by reference to the numbers of the paragraphs in the pleading to which they relate, with such qualifications as may be necessary or proper for protecting the interests of the party making such admissions, thus: 'the defendant admits the allegations made in the first, second, and third paragraphs of the plaintiff's claim.'"

147. "Each party in any pleading, not being a petition or a writ of summons, must allege all such facts not appearing in the previous pleading, (if any,) as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not so raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings; as, (for instance) fraud, or that any claim has been barred by the Statute of Limitations, or has been released."

148. "Save as above otherwise provided the silence of a pleading as to any allegation contained in the previous pleading of the opposite party is not to be construed into an implied admission of the truth of such allegation; and any allegation introduced for the purpose of preventing such implied admission, and not for the purpose of making intelligible the grounds of defence, is to be considered impertinent."

163. "Where the Court or a Judge shall be of opinion

that any allegations of fact denied, or not admitted either or any party, ought to have been admitted, the Court may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted."

240. "Each party is to admit such of the material allegations contained in the statement of claim or defence of the opposite party as are true; or he may give notice, by his own statement or otherwise, that he admits for the purposes of the action the truth of the case generally, or a part of the case stated or referred to in the statement of claim or defence of the opposite or any other party."

These rules embody what were before the introduction and substitution of them certain general orders of the Court of Chancery, which are as follow:

G. O. 122. "Answers are to consist of a clear and concise statement of such defences as the defendant desires to make." June 3, 1853.

123. "The silence of the answer as to any statement in the bill is not to be construed into an implied admission of its truth; and any allegation introduced into an answer for the purpose of preventing such implied admission is to be considered impertinent." June 3, 1853.

124. "A defendant is to admit in his answer such of the allegations contained in the plaintiff's bill as are to his knowledge of such defendant true, or as he can read or ascertain to be true, or he has reason to believe and does believe to be true, and it shall be sufficient if such admissions are expressed to be only for the purpose of the admissions in which the same are made." February 6, 1865.

125. "Admissions are in all cases where it is practicable to be by reference to the numbers of the paragraphs in the bill to which they relate, with such qualifications as may be necessary or proper for protecting the interests of the party making such admissions, and it shall not be necessary or proper in any answer to allege ignorance of any fact stated in the bill or any other reason for not admitting a fact therein alleged." February 6, 1865.

180. "When it becomes necessary to adduce evidence, or to incur expense otherwise, in order to establish or prove facts which in the judgment of the Court, upon the hearing of the cause, ought to have been admitted, it shall be competent to the Court to make such order in respect to the costs occasioned by the proof of such facts as under all the circumstances appears to be just." February 6, 1865.

The effect of these General Orders seems to be that whatever allegation of a material fact is made by either party in his pleading, and is not expressly denied by the opposite party, is to be taken to be in issue, and I understand that this is the effect that has been uniformly given to them by the Court of Chancery.

This effect has been once regretted: *Patric v. Sylvester*, 23 Grant 573, but it has nevertheless been deemed irresistible. I think that the same effect must be given to the Rules of the Judicature Act, above set forth, and that it is impossible to avoid doing so without ignoring altogether Rule 148; and the provisions of Rule 148 seem to be entirely supported by the provisions of Rules 140, 146, and 163, and there is nothing in the language of Rule 147, when rightly considered, which conflicts with them, that rule not including within the "grounds of defence," therein referred to, a denial of the allegations contained in the previous pleading.

It is obvious from the pleadings that the defendant Clark did not expressly admit the making of the bond in the statement of claim mentioned, and I think, therefore, that the making of it by him was properly in issue under these rules, and that he was entitled, under the pleadings, to deny that he executed it.

As to the second question, I have been unable, after considerable research, to find any case directly in point; we can therefore determine it only upon the principles of evidence which appear to us to apply to it.

If the evidence of collateral facts be directly or inferentially pertinent to the issue, it will be admitted: *Roscoe* N. P. 14th ed., p. 86.

The rule confining evidence to the points in issue not only precludes the litigant parties from proving any facts not distinctly controverted by the pleadings, but it limits the mode of proving even the issues themselves. Thus it excludes all evidence of collateral facts which are incapable of affording any reasonable presumption as to the principal matters in dispute: *Taylor on Ev.*, 6th ed., sec. 298. In sec. 300 Mr. Taylor recognizes an exception to this rule in favour of the admissibility of facts which, though collateral, are proved to be connected by some general link with the matter in issue; and in sec. 315 he recognizes another exception in favour of the admissibility of collateral facts for the purpose of confirming the testimony of witnesses.

It seems to me, having regard to these general principles, that the evidence of the defendant Clark ought to have been received to prove the fact that his signature had been obtained to the bond by a similar fraud to that which, according to Robinson's evidence, had been practised upon him in procuring his signature to it, because the fraud was practised with respect to the same instrument and by the same person, and at or about the same time; and because the evidence of Clark that it had been practised upon him was confirmatory of the evidence of Robinson that it had been practised on him.

The cases in England on the subject will be found in *Roscoe's* N.P. 14th ed., p. 85; and in addition I refer to *Bank of Montreal v. Scott*, 17 C. P. 358, and to *Stewart v. Scott*, 27 U. C. R. 27.

In my opinion, therefore, there must be a new trial, and as the plaintiffs' counsel insisted upon the rejection of the evidence, we must pursue the same course that we have pursued in setting aside nonsuits, and make the costs costs in the cause to the defendants in any event of the suit.

HAGARTY, C. J.—I concur in thinking that there must be a new trial in this case.

I rest my conclusion on the rejection of the evidence of **Clark** tendered by defendant Robinson.

The principles governing the case appear to me to be laid down in L. R. 4 C. P. D. 94, *Blake v. Albion Life Assurance Society*.

On the question as to what is admitted and what denied in pleading under the Judicature Act I wish not to express an opinion until a case arises expressly requiring our decision. I therefore neither assent to nor dissent from the opinion of my learned brother. At present I am hardly prepared to accept it to the full extent. If the case go down again to trial an amendment will probably be allowed to put the defence of both defendants on the same footing, costs to be costs in the cause to the ultimately successful party.

CAMERON, J., concurred.

Order absolute for new trial.



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[QUEEN'S BENCH DIVISION.]

CLARKE V. MACDONALD,
FLATT AND BRADLEY, GARNISHEES.

Division Courts Act—Garnishee proceedings—Notice disputing jurisdiction filed too late—Prohibition—High Court procedure.

Held, affirming the judgment of ARMOUR, J., that where a garnishee does not file a notice disputing the jurisdiction of a Division Court within the time required by 43 Vict. ch. 8, sec. 14. O., though no objection can be taken to this jurisdiction of the Division Court in that Court, the jurisdiction of the High Court of Justice to prohibit the proceeding is not ousted.

The garnishees, though partners, resided in different places out of the jurisdiction of the Division Court, and but one of them was served. An order was made dispensing with service on the other. The learned Division Court Judge gave judgment against both in their absence.

Per ARMOUR, J.—The prohibition might be supported on this ground also. R. S. O. ch. 47, sec. 134 construed.

The Judicature Act does not apply to a case of this kind, the proceedings of which are specially provided for in the Division Courts Act.

On the 10th day of March, 1883, the primary creditors caused to be issued out of the Fourth Division Court for the County of Bruce a summons upon the primary debtor and the garnishees to appear at the sittings of the said Court to be held at Chesley, in the said county, on the 10th day of April, 1883, the former to answer the creditors, who sued for the recovery of a claim of \$60.89 thereto annexed, and the latter to state and shew whether or not they owed any and what debt to the debtor, and why they should not pay the same into Court, to the extent of the creditors' claim, in satisfaction thereof. The garnishees did not, nor did either of them, live or carry on business in the division of the said Fourth Division Court, but they carried on business as co-partners in the City of Hamilton, in the County of Wentworth, and the said Bradley resided in the said City of Hamilton, and the said Flatt in the Township of East Flamborough, in the County of Wentworth. The said summons was served on Bradley on the 14th day of March, 1883, by delivering a true copy of the same personally to said Bradley, on the firm of Flatt & Bradley, but it was never served upon Flatt, nor was any order made dispensing with personal

service upon him. The summons was also served on the debtor on the 26th day of March, 1883. On the 30th day of March, 1883, the garnishees by their attorneys mailed to the clerk of the Fourth Division Court of the County of Bruce a notice denying that they owed any money to the debtor, and disputing the jurisdiction of the Fourth Division Court to try the cause. This notice was received by the said clerk and filed by him, and entered in his procedure book on the 2nd day of April, 1883, and he, on the 3rd day of April, 1883, notified the creditors thereof, who, upon receipt of such notice, consulted their solicitor, who informed them that they had entered their suit in the wrong Court, and that it would have to be transmitted to the Hamilton Court. On the 24th day of April, 1883, the suit came on for trial at the sittings of the said Division Court, and the acting Judge decided that the notice disputing the jurisdiction had not been filed in time, and proceeded to hear the cause in the absence of the garnishees, who were unrepresented thereat, and he thereupon gave the following judgment:

"On hearing all parties it is adjudged that the primary debtor is indebted to the primary creditors in \$60.89, and \$6.03 costs. 2. That the garnishees were indebted to the primary debtor in \$221.59 on the date of the service of the summons herein upon them, which to the extent of the first two mentioned sums ought to be applied in satisfaction thereof. 3. That the primary creditors do recover against the garnishees the said sums of \$60.89 and costs, to be paid in fifteen days in satisfaction as aforesaid."

On the 8th day of May, 1883, a motion was made for a prohibition, on behalf of Flatt and Bradley, to the presiding Judge in Chambers, which prohibition was on the 29th day of June, 1883, granted by Armour, J.

On November 27th, *Lash*, Q. C., for the primary creditors, moved to set aside the prohibition, and *Aylesworth*, for the garnishees, opposed the motion.

The arguments sufficiently appear in the judgment.

December 29, 1883. ARMOUR, J.—It was conceded, and indeed it could not be denied, that the Fourth Division Court of the county of Bruce had no jurisdiction over the garnishees; but it was contended that, inasmuch as the garnishees had not left with the clerk of that Court their notice disputing the jurisdiction of that Court within the time prescribed by 43 Vic. ch. 8, sec. 14, they were not entitled to prohibition.

That section provides that:

"In all cases where a defendant, primary debtor or garnishee intends to contest the jurisdiction of any Division Court to hear or determine any cause, matter, or thing in such Court, he shall leave with the clerk of the Court, within eight days after the day of service of the summons on him (where the service is required to be ten days before the return), or within twelve days after the day of such service (where the service is required to be fifteen or twenty days before the return), a notice to the effect that he disputes the jurisdiction of the Court, and such clerk shall forthwith give notice thereof to the plaintiff, primary creditor, or their attorney or agents, in the same way as notice of defence is now given; and in default of such notice disputing the jurisdiction of such Court, the same shall be considered as established and determined, and all proceedings may thereafter be taken as fully and effectually as if the said suit or proceeding had been properly commenced, entered or taken in such Court."

The garnishees did not leave with the clerk of the Fourth Division Court their notice disputing the jurisdiction of that Court within the time prescribed by this section, but the only effect of their omission to do so was, that they could not thereafter raise in that Court any objection to its jurisdiction, and the jurisdiction of that Court would thereafter be considered by that Court as established and determined; but such omission would not have the effect of depriving them of their right to come to this Court for prohibition, nor of ousting this Court of its right to grant such prohibition.

"No rule," says Pollock, B., in *Oram v. Brearey*, L. R. Ex. D. 347, "is better understood than that the jur-

diction of a Superior Court is not to be ousted, unless by **express** language in or obvious inference from some Act of **Parliament**." And I do not think that there is anything in **this** section which by obvious inference (certainly not by **express** words) ousts this Court of its jurisdiction, having regard to the rule of law stated by the Master of the Rolls in *Jacobs v. Brett*, L. R. 20 Eq. 1, in which he says: "It is perfectly plain that either the Crown or any subject may intervene and inform a Superior Court that an Inferior Court is exceeding its jurisdiction, and it is the duty of the Superior Court when it is so informed to confine the Inferior Court within the limits of its jurisdiction."

The question in *Jacobs v. Brett* arose under the Mayor's Court of London Procedure Act, 20 & 21 Vic. Cap 157, by section 15 of which it is provided that "no defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever except by plea," and the Master of the Rolls held that this section had not the effect of ousting the Superior Court of its jurisdiction to grant prohibition, but merely limited the mode in which objection to its jurisdiction could be taken in the Inferior Court. *Jacobs v. Brett* was approved of by the Common Pleas Division in *Bridge v. Branch*, L. R. 1 C. P. D. 633.

The question in *Oram v. Brearey* arose under the Salford Hundred Court of Record Act, 1868, 31 & 32 Vic., cap. 130, sec. 9, of which enacts that "No defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and if the want of jurisdiction be not so pleaded the Court shall have jurisdiction for all purposes;" and the Exchequer Division held that this section had not the effect of ousting the Superior Court of its jurisdiction to grant prohibition.

I do not think the words of section 14 of 43 Vic. Cap 8, are any stronger than the words used in the sections of the Act under consideration in *Jacobs v. Brett* and *Oram v. Brearey*, and I think that they ought to be construed as those were construed, not to oust this Court of its jurisdiction to prohibit.

There is another ground upon which the prohibition in this case can be supported, and that is this, that Flatt, one of the garnishees, was never served with the summons at all, nor was any order made dispensing with service of the summons upon him, and the acting Judge had therefore no jurisdiction to give the judgment he gave against the garnishees.

R. S. O. ch. 47, sec. 134, enacts that "a copy of such summons and memorandum shall be duly served on the garnishee, or if there be joint garnishees, then on such of them as are within reach of the process, at the time and in the manner required for service in ordinary cases."

The words, "within reach of the process," must be taken to mean within Ontario, and capable of being served, reasonable efforts being made for that purpose; the words, "at the time," within such time before the sittings of the Court as is required in ordinary cases; and the words, "in the manner," personally, if the claim exceeds eight dollars, and if it does not exceed eight dollars, personally on some grown-up person, being an inmate of the dwelling or usual place of abode, trading or dealing of the person requiring to be served. See Division Court Rules, 53 and 54.

By rule 55 it is provided that the Judge in any such garnishee proceeding may order that the service need not be personal; but no such order was made in this case.

By section 140 it is enacted that judgment shall not be given either against the primary debtor or the garnishee until the said summons and memorandum, with an affidavit of the due service of both on the proper parties, are filed unless the Judge, for special reasons, orders otherwise.

I think it clear that, having regard to these provisions the acting Judge had no jurisdiction to give the judgment against the garnishees which he did without personal service of the summons upon Flatt, or without an order dispensing with it and directing how service upon him should be effected.

It is said, however, that the garnishees being partners residing in different divisions, service of the summons

might be well made upon one, under section 77; but I do not think that this section applies to service of a garnishee summons, the service of which being specially provided for by section 134; but if section 77 does apply, the judgment in that case could only have been against Bradley alone, and not against Flatt and Bradley as it is now.

It was contended, however, that the provision of the Judicature Act, allowing a suit to proceed and judgment to be recovered against a partnership firm, applied to the Division Courts; but I think it clearly does not so apply, because it is only in cases not expressly provided for by the Division Court Act, and rules that the County Court Judges may, in their discretion, adopt and apply the general principles of practice in the Superior Courts of Common Law to actions and proceedings in the Division Courts. See section 244.

Nor does the Judicature Act so apply by virtue of the 77th section thereof. See *Pryor v. City Offices Company*, L. R. 10 Q. B. D. 504.

In my opinion the appeal must be dismissed, with costs.

HAGARTY, C. J.—The words in our statute, sec. 14, are, “In default of such notice disputing the jurisdiction of such Court, the same shall be considered as established and determined, and all proceedings may thereafter be taken as fully and effectually as if the said suit or proceeding had been properly commenced, entered or taken in such Court.”

My brother has pointed out that under the authority of *Jacobs v. Brett*, L. R. 20 Eq. 1, decided by Jessel, M. R., that under the statute respecting the Mayor's Court, sec. 15, declaring that no defendant should “object to the jurisdiction of the Court in and by any proceeding whatsoever except by plea,” did not oust the right of the Superior Courts to prohibit. The Master of the Rolls notices the celebrated case of *Cox v. The Mayor, &c., of London*, L. R. 2 H. L. 239, and distinction is drawn between a defendant and a garnishee.

I should have thought the language of our Act was of a

stronger character than the 15th section of the Mayor's Court Act; but on referring to the other case cited by my learned brother, *Oram v. Brearey*, I find the same view is taken by the Exchequer Division under an Act much stronger in its language.

Sec. 7 of the Salford Hundred Court of Record Act, 1868, seems as strong as our own statute. This language was held not to prevent the Superior Court from granting prohibition.

On the authority of these cases, at all events of the latter, I think we may venture to interpose and prevent an apparently very grave injustice being perpetrated on these garnishees.

CAMERON, J., concurred.

Appeal dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

NEALD V. CORKINDALE AND FOSTER.

County Court action—Third party—Trial of issues between defendant and third party—Investigating accounts beyond pecuniary jurisdiction of County Court—Prohibition.

In an action in a County Court on a promissory note made by the defendant, which the defendant claimed indemnity against the third party, the third party having appeared, the learned Judge of the County Court directed certain issues to be tried between the defendant and the third party. At the trial he found for the plaintiff, and investigated accounts between the defendant and the third party amounting to more than £1,000, upon which he found that a balance of more than \$3,000 would be payable to the defendant, and he directed that the third party should, of this balance, pay to the defendant the amount of the plaintiff's claim. On a motion for a prohibition, that the order directing the issues between the defendants and the third party, and the proceedings taken under it were right. It was also, that as the only relief which could be given to the defendant against the third party was protection against the demand of the plaintiff, which was within the pecuniary jurisdiction of the County Court, the learned Judge was not acting beyond his jurisdiction in investigating accounts of sums beyond his jurisdiction.

MOTION for prohibition.

The action was brought by the plaintiff, as payee of a promissory note made by Corkindale, for \$286.75, the price of goods which Corkindale bought from the plaintiff at the store he carried on in Picton in the county of Kent. The action was brought in the County Court of Stormont, Dundas, and Glengarry. Corkindale employed Foster with a notice under Rule 107 of the Judicature Act, for the purpose of being indemnified by Foster against the claim of the plaintiff, and Foster was, by order of the Judge of the County Court, "made a party defendant in the cause."

Corkindale admitted his liability upon the note, and he pleaded that he gave the note for goods he bought for the store in Picton, which he was carrying on for Foster: that Foster received the proceeds of such of the goods as were sold in the store, and the residue of the goods, when he (Corkindale,) delivered over the whole of the store goods to Foster; and that Foster, upon and in consideration of such

delivery, promised to pay for the goods so bought from the plaintiff. Corkindale also pleaded he bought the goods for Foster, an undisclosed principal, who promised to pay for them, and he claimed to be indemnified by Foster against the plaintiff's demand.

Foster appeared. The issues directed to be tried between the two defendants were :

1. Was Corkindale the agent for Foster, an undisclosed principal, in the purchase of the goods ?

2. Did Corkindale pay to Foster the money derived from the sale of such of the goods as were sold, and did Foster take a delivery of the remaining unsold stock from Corkindale and account to the creditors for the same, pursuant to agreement with and delivery by Corkindale ?

3. Was Corkindale entitled to any relief as against Foster in respect of the said matters ?

Foster put in a defence denying that Corkindale was the agent for him, as an undisclosed principal, and alleging that Corkindale was his special agent and clerk to carry on the store under a written agreement, and denying that Corkindale had any authority to buy goods for the store, or to bind him Foster to pay for the same, and denying also that he took a delivery of the goods from Corkindale; but as Corkindale had not conducted the business properly he (Foster) discharged Corkindale from his service, and took the possession of the store goods, and he denied that Corkindale was entitled to indemnity.

The issues were tried at Picton before the learned County Court Judge for the county of Prince Edward.

It was said he found certain matters upon the trial of these issues, but it did not appear what the specific findings were; and it was said that he investigated the accounts between the two defendants, amounting to about \$10,074.48, and that he found Foster's claim on the goods amounted to \$6,860.93, leaving a balance of \$3,213.55, which would be payable to Corkindale; but as Corkindale had made assignment for the benefit of his creditors, that sum was payable to the assignees.

The judgment, without stating upon what specific grounds it was given, was that Foster should pay to the assignees of Corkindale the amount of the plaintiff's demand, with such costs as were taxed against him, setting forth the amount.

The motion for a prohibition was made, because it was said the Judge of the County Court had to investigate and did investigate accounts between the parties to an amount far beyond the pecuniary jurisdiction of the County Court.

J. H. McDonald, for the motion, referred to *Re Dixon and The Executors of Snarr*, 6 P. R. 336; *Archibald v. Bushey*, 7 P. R. 306; *Robertis v. Humby*, 3 M. & W. 120; *Corporation of Town of Dundas v. Gilmour*, 2 O. R. 463.

McMichael, Q.C., Ogden, with him, referred to *Judicature Rules*, 107 to 110; *Judicature Act*, sec. 16, sub-sec. 4; *Benecke v. Frost*, 45 L. J. Q. B. 693; *Turner v. Hednesford Gas Co.*, 47 L. J. Ex. 296; *S. C. L. R.* 3 Ex. D. 145; *Davis v. The Flagstaff Silver Mining Co. of Utah*, L. R. 3 C. P. D. 228; *Wallbridge v. Brown*, 18 U. C. R. 158.

McDonald, in reply. Section 78 of the Act applies to counter-claims, and not to cases in which a third party is brought in to indemnify the defendant; and so the case in L. R. 3 C. P. D. 228 does not apply.

Jan. 11, 1884. WILSON, C. J.—The case is not one of counter-claim, for it does not affect the plaintiff's demand or rights in any respect: *Furness v. Booth*, 4 Ch. D. 586.

It was decided under the English rule, of which our rule 107 is the equivalent, that when a notice is served under the corresponding English rule to the rule 108 on another person from whom indemnity is sought, no relief can be given in that action against the party notified or made a defendant: that such person is so notified or made a party merely to bind him by the judgment which is or may be obtained against the original defendant; and that the relief which the original defendant is entitled to must be sought for from the co-defendant in an independent

action brought for that purpose. *Treleaven v. Bray*, 45 L. J. Ch. 113, 1 Ch. D. 176, and other cases, followed that one, and upon the authority of that case *Dundas v. Gilmour*, 2 O. R. 463, was decided. In *Bagot v. Easton*, 11 Ch. D. 302, an order was made for the trial of issues between co-defendants to the action in which the new party was added by way of indemnity. The later cases of *The Carlsburn*, 5 P. D. in appeal, 59; *Piller v. Roberts*, 21 Ch. D. 198; *Schneider v. Butt*, 8 Q. B. D. 701, show the practice to be to settle the rights between co-defendants in the same action in which the co-defendant has been added or notified. But that, of course, appears as one would expect it to be, when such trial will not delay or embarrass the plaintiff, and can conveniently for all parties be disposed of in the same action.

The order in this case was therefore rightly made, and the proper proceedings were taken under it, and so the objection to the authority of the Judge to direct the issues between the co-defendants to be tried in the action, as well as to the trial of the issues, fails.

The other objection is, that in trying the issues between the co-defendants the Judge had to investigate and did investigate the accounts between them, amounting to the sum of about \$10,000, and far beyond the jurisdiction of the County Court. I really do not know what specific facts the learned County Court Judge, who tried the cause found or did not find. If I did know I could more easily dispose of the case. If, for instance, he found the first issue for Corkindale, there would have been no occasion to go into the accounts between the defendants; if for Foster an investigation of the accounts might be necessary to determine whether Foster had or had not paid Corkindale for the goods; but that was not pretended to have been the case. Then, upon the second issue, if the Judge found that upon the delivery over of the goods by Corkindale to Foster the latter promised in consideration of such delivery to pay the plaintiffs, there would be no occasion to investigate the accounts; but if his finding were

other way it might be necessary to make such investigation on the like ground applicable to the first issue.

So even upon the third issue, worded as it is in so general a form, it might or might not be necessary to go into the state of accounts between the defendants.

It is said, however, the learned Judge found everything against Corkindale excepting that he had a claim against Foster, by reason of and by the delivering up of the goods to an amount exceeding \$3,000, and because that was so Foster was directed to pay this claim of the plaintiff out of that sum. That is the substance of the affidavit of J. L. Geddes, made upon information and belief, as appears, as he says, by the Judge's notes of the trial.

It is not said by Foster that he does not owe Corkindale the amount said to have been found against him; nor that he is not bound to account to Corkindale or his assignees for that amount. The only objection, as I understand it, is, that although bound to account for that balance, the Judge had no power to take the accounts, as the amount of them far exceeded the jurisdiction of the County Court.

If there had been a counter-claim, the case of *Davis v. The Flagstaff Silver Mining Company of Utah*, 3 C. P. D. 228, shows that under the English Act, corresponding with our 78th section, the Judge of a limited jurisdiction is authorized to investigate matters beyond his ordinary jurisdiction; that is, that he is "to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto; but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim."

These latter words, limiting the relief to and by the jurisdiction which the Court has the power to administer, is a sufficient protection against the exercise of any excess of authority by the Inferior Court or Judge.

That which is expressly provided for in the enactment to counter-claims is, from the very nature of the relief sought for under Rules 107 to 110, limited by the amount

of the plaintiff's demand, which must, to be supported, be within the competence of the Court in which it is made.

In the case of a counter-claim relief can in no case be given to the defendant as against the plaintiff which shall be in excess of the jurisdiction of the Court. In the case of indemnity claimed by the defendant against one who is made a co-defendant for that purpose, the only relief which is asked against the co-defendant is to be protected against the demand of the plaintiff, and that demand must, of course, be within the jurisdiction of the Court.

A counter-claim is in the nature of a wholly different action, which the plaintiff cannot defeat by discontinuing his action: *Beddall v. Maitland*, 17 Ch. D. 174; and the defendant may recover upon the counter-claim damages to a larger amount than the plaintiff's demand. In the case of indemnity asked for I should say the claim for it must be determined by anything which puts an end to the action, and in no case can the defendant get more or other relief than protection against the plaintiff's demand.

I am of opinion, therefore, on the whole case, that the motion fails, and that it must be discharged, with the costs of this motion.

Motion dismissed, with costs.

[CHANCERY DIVISION.]

LUMSDEN V. SCOTT.

Fraudulent preference.—Debtor and creditor—Parties—Demurrer—R. S. O. c. 95, s. 13.

A creditor's assignee, not himself a creditor, cannot sustain an action to set aside a fraudulent conveyance or transfer made by the debtor, prior to the assignment under which he claims to be such assignee.

THIS was a demurrer to the plaintiff's statement of claim.

The plaintiff set out in the said statement :

1. That he resided at Hamilton, and was by assignment in writing of August 4th, 1881, from one J. J. Moore to himself, assignee of the estate and effects of the said J. J. Moore, including the property thereafter mentioned, "in trust for the benefit of himself and all the other creditors of the said J. J. Moore, for the purpose of satisfying ratably and proportionately, and without prejudice or priority, all the creditors of the said J. J. Moore, their just debts and claims against the said J. J. Moore."
2. That he had accepted the said trust, and entered on the execution thereof, and so had discovered the fraudulent transfer thereafter mentioned.
3. That the defendant was the owner and manager of Scott's Bank, a private bank in the town of Listowel.
4. That "the said J. J. Moore was and still is largely indebted to the firm of Lumsden Bros., Hamilton, of which the plaintiff is a partner, to wit in the sum of \$800 or thereabouts, and was also indebted to other parties in a large amount who had come in and accepted the terms of the said trust deed."
5. That the defendant was a creditor of the said J. J. Moore, on a certain promissory note made by J. J. Moore, and indorsed by his (Moore's) father.
6. That the said J. J. Moore carried on a grocery business at Listowel, and in the spring of 1881 became insolvent, and while so insolvent the defendant, well knowing his circumstances, and prior to the maturity of the said note,

or of any other debt from the said J. J. Moore to him, in order to obtain a fraudulent preference over and to defeat and hinder Moore's other creditors in getting payment of their just claims against him, with Moore's consent and concurrence, to protect Moore's father against his endorsement of the said note, procured the said Moore, without value or consideration, in or about June, 1881, to execute to him an assignment of all book debts and accounts of the said J. J. Moore.

7. That J. J. Moore while so insolvent, in July, 1881, sold the stock-in-trade and good will of his grocery business at Listowel to one A. D. Freeman for \$850, and in payment thereof accepted from the said Freeman promissory notes of the said Freeman, which notes the defendant, with the consent and concurrence of the said J. J. Moore, procured the said J. J. Moore to endorse to him, without valuable consideration of any kind, for the purpose of enabling the said defendant to get a fraudulent preference over J. J. Moore's other creditors, and to defeat, hinder, and delay the latter, at the time of such endorsement, well knowing Moore's insolvent circumstances.

8. That the said book debts and accounts and promissory notes, the proceeds of the sale of the said grocery business were all the assets the said J. J. Moore had wherewith to meet the claims of his creditors, of which the defendant had full knowledge at the time he procured the said assignment of said book debts and accounts, and the endorsement of the said Freeman notes to him.

And the plaintiff claimed "on behalf of himself and all other creditors of the said J. J. Moore."

1. That the said assignment of book-debts and accounts and endorsement of the said Freeman notes to the defendant was fraudulent and void, and that the same be set aside as against the plaintiff, and the other creditors of the said J. J. Moore.

2. That the defendant be ordered to assign the said book debts and accounts, and endorse the said Freeman notes to the plaintiff.

3. An account of all moneys received by the defendant account of the said book debts, &c.
4. That the defendant be ordered to pay to the plaintiff such moneys so received by him.
5. For general relief.
6. For costs of this action.

The defendant demurred to the above statement on the following grounds:

1. "Firstly, as to so much of the said statement of claim relates to the assignment of the book debts and accounts referred to in the sixth paragraph of the said statement of claim, and the relief sought with regard thereto, that it appears in and by such statement that the plaintiff claims assignee of J. J. Moore in said statement mentioned, and that such assignment to the plaintiff was made subsequently to that to the defendant; but no ground in law is shewn why the defendant's assignment should not prevail as against the plaintiff, he not being in his personal capacity a creditor of the said J. J. Moore.

2. "Secondly, as to so much of the said statement of claim as relates to the endorsement to the defendant of the promissory notes in the seventh paragraph of the said statement of claim referred to, and the relief sought in regard thereto, that it appears in and by the said statement of claim that the plaintiff claims the said notes, or the proceeds thereof, as assignee of J. J. Moore in said statement mentioned, but it does not sufficiently appear whether such assignment to the plaintiff was prior or subsequent to or contemporaneous with that of the defendant, nor is any ground in law shewn why the defendant's assignment should not prevail as against the plaintiff, and therein the said statement is vague and uncertain and as to the whole statement the defendant demurs and says the same is bad in law.

3. "That it does not appear that the plaintiff is a creditor of the said J. J. Moore, or that he or any other person has obtained judgment or execution against the said Moore, nor is any claim set out on which judgment

could be obtained, or so as to satisfy the Court that a claim exists.

4. "That it appears by the said statement that plaintiff is not the proper party to bring this action, being estopped by the acts of his assignor. And on other grounds sufficient in law to sustain this demurrer."

The demurrer came up for argument on May 3rd, 18 before Ferguson, J.

Sheppard, for the demurrer. If the firm of which the plaintiff is a member had been the plaintiff's here, no doubt the claim would not have been demurable. A creditor could sustain the action; but the plaintiff claims as purchaser from Moore, and Moore had previously disposed of the property to the defendant. The plaintiff is not a creditor at all. I cite on these points *McMaster v. Clark*, 7 Gr. 550; *Stone v. Van Heythuysen*, 11 Ha. 126. Though it does not appear that the plaintiff's deed was first, as he should have done. The statement of fraud cannot be made by the plaintiff, because he shews that he has not got a title.

B. B. Osler, Q. C., for the plaintiff. The question is, can creditors' assignee sustain an action against a fraudulent assignment. The Statute, R. S. O. ch. 95, sec. 13 says "creditors and others." See, also, *May's Fraudulent and Voluntary Conveyances*, ed. p. 149. But the English cases in bankruptcy do not put the right on that ground. See *Butcher v. Harrison*, 4 B. & Ad. 129; *Holmes v. Penny*, 3 K. & J. 90; *re Andrews*, 2 App. 24. All these cases are more recent than those cited by the plaintiff. But, apart from this, the claim shews the plaintiff to be a partner of the firm: and he claims on behalf of himself and all other creditors. The case of *Reese River Silver Mining Co. v. Attwell*, L. R. 7 Eq. 347, shews that a plaintiff need not be a judgment creditor. This is no longer arguable. See also, *Anderson v. Maltby*, 2 V. & 44. If the judgment of the Court is against us, we will leave to amend.

Sheppard, in reply. The existence of a debt is a conclusion of law, and the bare statement of a debt is not sufficient in a claim of this kind.

February 5th, 1883. FERGUSON, J.—The plaintiff sues as assignee for the benefit of the creditors of one J. J. Moore, under an assignment executed on the 4th day of August, 1881. The plaintiff does not say that he was himself a creditor of J. J. Moore, nor does he sue in any capacity other than as assignee under this assignment executed by Moore. This assignment is stated to be in trust for the benefit of the plaintiff and all other creditors of Moore. This would rather imply that the plaintiff was a creditor. but where the statement of claim professes to allege the existence of a debt it says that Moore “was and still is largely indebted” to the firm of which the plaintiff is a member, and indebted to other persons in large amounts. It was not contended on the argument that the plaintiff was a creditor or that the statement of claim so alleged.

The object of the suit is to set aside as fraudulent and void an assignment of book debts and accounts, and the transfer of certain notes. The assignment and transfer were made by Moore to the defendant at a time previous to the assignment from Moore to the plaintiff. The statement of claim demurred to alleges that the assignment to the plaintiff is an assignment of all the estate and effects of Moore, “including the property hereinafter mentioned,” by which last seems to be meant the property which had been previously transferred to the defendant; but this, taken in conjunction with the other allegations in the claim, can only be a statement of a conclusion of law.

The question is, I think, single, and just as Mr. Osler said on the argument, namely: Can a creditor's assignee sustain a suit to set aside a fraudulent conveyance or assignment made by the debtor, the assignor, prior to the assignment under which the creditors' assignee claims? and I am of the opinion that he cannot: *Re Andrews*, 2 App. 24, was amongst other cases relied on by the plaintiff, but there

the plaintiff was assignee in insolvency and the decision was under the 39th section of the Insolvency Act of 1875, which places the assignee in a position altogether different from the position of the present plaintiff; and the other cases cited for the plaintiff are, I think, clearly distinguishable from the present case; and, I think, the case of *McMaster v. Clare*, 7 Grant 550 fairly supports the contention of the defendant.

I think the demurrer must be allowed, with costs, with leave, as asked, to the plaintiff to amend as he may be advised, on payment of costs.

A. H. F. L.

[CHANCERY DIVISION.]

McCLENAGHAN V. GREY.

Demurrer for want of parties—Churchwardens—Incumbent—Church Temporalities Act—3 Vic. ch. 74—Rule 189.

Where a testator bequeathed unto the incumbent of a certain church all the property she might die possessed of, to be used for the relief of the poor of the church, to be dispensed by the said incumbent, and the churchwardens brought an action, on behalf of themselves and all the members of the congregation, against the executors, to have the estate administered, and for a declaration that the incumbent was entitled to distribute the fund, and an order for payment over of all such sums as should have been distributed by the incumbent among the poor of the church.

Held, on demurrer to the statement of claim, that it was bad in substance, for the churchwardens had no title to maintain the action, since they could not be said to represent the incumbent, to whom the bequest was made, and who was not a member of the congregation in the same sense as the plaintiffs and the other members, and sec. 6 of the Church Temporalities Act, 3 Vic., c. 74, did not authorize them to sue.

Seemable, that the said section gives churchwardens authority in certain specified matters, in which all the members of the church are interested, but here the bequest was only to a particular class, viz., the poor of the church, and therefore not within the section.

Cited *Lowes v. Hilliard*, L. R., 4 Ch. D. 413, and *New Westminster Brewing Co. v. Hannah*, 24 W. R. 899 followed, and *Werdnman v. Société Générale d'Electricité*, L. R. 19 Ch. D. 246 distinguished.

THE action was brought by Alexander McClenaghan and John Hart, wardens of St. Paul's Church, Woodstock, on behalf of themselves and all the other members of the congregation of the said church, against the defendants the executors of Bridget Wilson.

The amended statement of claim gave a history of the church, and the creation of the rectory in 1836, cited the Church Temporalities Act (a) as vesting the soil and freehold in the incumbent for the time being, and the churchwardens, stated the appointment and death of the first incumbent, and the appointment of the Rev. Mr. Hastings, the present incumbent, in May, 1882, and that the plaintiffs were the wardens of the church and members of the congregation. The claim then stated the will of Bridget

(a) 3 Vic. ch. 74 (C.)

Wilson made in April, 1876, appointing the defendants her executors, and after giving some small legacies, that, thirdly, she gave and bequeathed unto the incumbent of St. Paul's Church for the time being \$500, and all other property, money, and effects she might die possessed of, to be used for the use and relief of the poor of the said church to be dispensed by the said incumbent. The claim alleged that the defendants refused to permit the incumbent to dispense the funds, and that they were misapplying them. The plaintiffs claimed to have the estate administered, to have a declaration that the incumbent was entitled to distribute the funds, and that the defendants might be ordered to account for and pay over all such sums as should have been distributed by the incumbent for the time being of the said church, amongst the poor thereof.

The defendants demurred, on the grounds that :

1. The plaintiffs had no title to maintain this action.
2. That the proper person to require the defendants to account was the incumbent, and no reason was shewn why he should not be the plaintiff in this action, or why he should not be a party thereto.

The demurrer came on for argument on April 4th, 1883, before Proudfoot, J.

C. Moss, Q. C., for the demurrer. *Crump & Evans* on Jud. Act, p. 720, shews you can demur to an amended statement of claim; *Powell v. Jewesbury*, L. R. 9 Ch. 134, also shews this clearly. *New Westminster Brewery Co. v. Hannah*, 24 W. R. 899, shews if the plaintiffs have no *locus standi* this demurrer must succeed.

S. H. Blake, Q. C., contra. It is clear the plaintiffs have a *locus standi*; and, at most, all that can be said for the defendants is that some one else may have some right; but even on that ground, the statement as it stands is good, for—
 (1) The incumbent is a member of the church, and is before the Court by representation. (2) There is a right on the part of the churchwardens as a body, and as members of

the church, to take these proceedings. Under the will all the members of the church might have come and claimed to have the estate administered. Since the Judicature Act there is no demurrer for misjoinder.

[PROUDFOOT, J.—If these parties have no interest themselves, they have no right to represent others.]

“The poor” are included in all the members of the church. Here the churchwardens take these proceedings on behalf of *all* the members. Then, under clause 6 of the Church Temporalities Act, 3 Vic. ch. 74, the churchwardens have the right to take these proceedings, even if “the poor of the church” are not necessarily members of the church; and public statutes need not be set out by the pleader. It is clear under the authorities since the Judicature Act that it is not necessary that *all* the persons interested should be before the Court in order to defeat a demurrer. The case of *Werderman v. Société Générale d'Electricité*, L. R. 19 Ch. D. 246, shews there is no demurrer now for want of parties; and I may refer here also to *Long v. Crossley*, L. R. 13 Ch. D. 388. The same rule was apparently followed in *Woodward v. Shields*, 32 C. P. 282. Then, looking at rule 95, we find it says, “in addition to, or in lieu of:” *MacLennan's* Jud. Act, p. 146; see also rule 189, *ib.* p. 214. Here there is an admitted cause of action. The whole question is one of parties. I refer to rule 89, *ib.* p. 140; rule 90, *ib.* p. 142.

[PROUDFOOT, J.—Mr. MacLennan says, under rule 90 an application can only be made by a plaintiff.]

But the other portions of the Act and rules give the Court wider powers. So then we say: (1) the incumbent is included, as being a member of the congregation; (2) the poor of the church are represented; (3) the churchwardens under the Temporalities Act represent all; (4) under the Judicature Act, if there is a cause of action at all, the Court will, if necessary, add parties.

C. Moss, Q. C., in reply. We have a right to refuse to give any explanation to persons who have no right to ask for it. It would be contrary to common sense to allow

persons bringing a suit in a matter in which they have no rights to add some other party who has a right, and so escape demurrer. *New Westminster Brewery Co. v. Hannah*, 24 W. R. 899, shews clearly that when plaintiffs have no right of action themselves, they cannot bring in other persons who have a right of action, and so sustain their action. I may also refer to *Turquand v. Fearon*, L. R. 4 Q. B. D. 280. The real scope of the Judicature Orders is there pointed out. *Werdermann v. Société Générale d'Electricité*, L. R. 9 Ch. D. 246, is distinguishable. We say here, plaintiffs have no cause of action in them against us; and this being so, it is no answer to us to say some one else has a cause of action. The case of *Clowes v. Hilliard*, L. R. 4 Ch. D. 413, is a strong authority in our favour. The contention that the plaintiffs have an interest is not sustainable. Consider the effect of a decree against the plaintiffs. Would it protect the defendants against the incumbent? Would it estop him? The testatrix makes a specific bequest to an individual, the incumbent, and he is to administer it himself. It is clear, therefore, that the only person who has any right in this fund is the incumbent. To say the plaintiffs represent the incumbent is far-fetched. As a rule, the dispensing of all charities is vested in the incumbent, and the churchwardens have only to do with the property of the church; and it is evident from the earlier clauses that the Temporalities Act referred only to the property of the church. Besides, the incumbent would be the person to demand account from the executors and the *cestuis que trustent* could not maintain this suit unless there was collusion.

April 11th, 1883. PROUDFOOT, J. [after stating the pleadings]—In support of the bill it was contended that the plaintiffs suing on behalf of all the members of the congregation virtually represent the incumbent, who is a member. There is no allegation in the bill that the incumbent is a member of the congregation, and I cannot assume that he is. Certainly he is not a member in the sense that the

Churchwarden and the other members are. They are not of the same class with him, and there is no statement that their interests are identical. But the bequest is not to the congregation, but to the incumbent, to a person duly appointed, to a person appointed by a competent authority to take the charge of this congregation. Now, certainly the other members of the church and the churchwardens are not in that position.

It was further contended that under the 6th section of the Temporalities Act, which says that the churchwardens shall represent the interest of the church and the members of it, and may sue and be sued in respect of the church and churchyard, and all matters and things appertaining thereto, that the bequest constituting a fund for the benefit of the poor of the church, the plaintiffs have a right to call on the defendants to hand it over—that it is a matter pertaining to the church.

I do not think this a proper construction of the Act. This 6th section gives them authority in the matters specified in which all the members of the church are interested, and perhaps if the bequest had been to the church, the plaintiffs might have had a cause of action. But in this case it is only to a particular class, the poor of the church, and I do not think the plaintiffs have any more right to call for the administration of the bounty than they would have had to sue for a legacy given to a single member of the church.

It was finally contended that there can be no demurrer for want of parties since the Judicature Act, referring to *Werderman v. Société Générale d'Electricité*, L. R. 19 Ch. D. 246. In that case the Court of Appeal held that where the plaintiff had a right of action there could be no demurrer because other persons ought to be parties—the equivalent for our marginal rule 189 only authorizing a demurrer for matter of substance. *Long v. Crossley*, L. R. 13 Ch. D. 388, was also cited. It was not a case of a demurrer, but an application at the trial to amend by adding plaintiffs. The application was made under rules 90 and 91,

but it was granted under rule 103a. The original plaintiff was a necessary party to the action, for though she had no power to agree for the lease which she sought to have specifically performed, she was tenant for life of the property. Under rule 189 there could have been no demurrer on this ground.

But I think cases of that class do not govern the one before me. This is not a demurrer for want of parties. It is a matter of substance—that the plaintiffs have no right of action. The express point was decided in *Clowes v. Hilliard*, 4 Ch. D. 413. The bill was filed by members of an unascertained future contingent class for the administration of a testator's personal estate. The executors demurred on the ground that the plaintiffs had no such interest as entitled them to institute the action. The plaintiffs, at the argument of the demurrer, asked, if the opinion of the Court should be adverse to them, for an order adding as plaintiff a person who had an interest under rule 90. Sir George Jessel, M. R., said the rule only applied where the action had been commenced through a *bond fide* mistake. It did not apply to such a case as that. He determined that the plaintiffs had no right to institute the action, and allowed the demurrer. The case of the *New Westminster Brewery Co. v. Hannah*, 24 W. R. 899, decided by Hall, V. C., was an application at the hearing to add as plaintiffs persons having a right to sue, those on the record having none, under rule 103a. The V. C. refused it, observing, "I cannot say that in the case of a sale like the present, a person who may have a title ought to be joined with one who has no title or interest at all."

I think the demurrer must be allowed, with costs.

I do not decide who has the right to sue for the administration of this charity, but only that the plaintiffs have not the right.

A. H. F. L.

[CHANCERY DIVISION-]

RYAN V. FISH ET AL.

Dower Act—Damages for detention—Damages for mesne profits—Tout temps pris—R. S. O. c. 55, ss. 10, 20, 23, 25—O. J. A. s. 17, sub-s. 10—ib. 16, sub-s. 3.

R brought an action for dower against F., the tenant of the freehold, who claimed title through the devisee of her husband, and endorsed her writ with a claim for damages for detention of dower. F. appeared and admitted his tenancy, and R.'s right to dower:

Held, that R. might, nevertheless, go on and recover damages for the detention from and after demand for dower made by her on F.

Held, also, that R. S. O. c. 55 has not taken away or diminished the right of a dowress to damages as well for *mesne* profits, as for detention, against all persons and in all cases where they were recoverable before August 10th, 1850.

Held, further, that, at all events, since O. J. A. s. 17, sub-s. 10, a tenant of the freehold claiming, as in this case, may plead that he has at all times, since he became such tenant, been ready and willing to render the plaintiff her dower, and if the plaintiff desires to avoid that plea she should reply a demand and refusal.

Quere, whether if such demand and refusal be pleaded and proved, damages can be computed against such a tenant from the death of the husband or only from the date of the plaintiff's demand for dower.

THIS was an action brought by Catherine Ryan, plaintiff, against Robert G. Fish and Robert Ransom, defendants, claiming damages for detention of dower. The writ was issued on March 22nd, 1882. The statement of claim set forth that Thomas Ryan, the husband of the plaintiff, died on or about March 27th, 1879, and devised to his son Patrick the north-quarter of No. 1 in the 13th concession (western section) of Wellesley, and the south half of No. 1 in the 14th concession (western section) of the said township containing 150 acres, whereof he died seized.

The defendant Fish was the owner in fee of the said land, claiming title through the said devisee, and the defendant Ransom was in possession thereof.

The deceased made no provision for the plaintiff.

The defendants appeared to the writ of summons and acknowledged that they were the tenants of the freehold of the said lands, and consented that the plaintiff might

have judgment for her dower therein, and might take the proceedings authorized by the R. S. O. ch. 55, to have the same assigned to her.

The plaintiff claimed \$1,000 damages for the detention of her dower, from March 28th, 1879, or a reference to the Master to fix a proper sum as damages therefor.

In their statement of defence the defendants alleged that at the time of the death of the plaintiff's husband the greater portion of the said lands was and continued to be for some time thereafter in a state of nature and unimproved by clearing fences or otherwise, for the purposes of cultivation or occupation, and that the plaintiff was not entitled to the sum she claimed for damages, but if to anything she was entitled only to a much smaller sum; and they denied they detained the dower, and they said that from the time of the death of the plaintiff's husband they have always been ready to render to the plaintiff her dower, and the plaintiff was not entitled to any damages for detention of her dower.

Issue.

The cause came on for trial at Toronto, before Wilson, C. J., Common Pleas Division, on May 1st, 1883.

The questions were whether the plaintiff was entitled to damages or not, and if so from what time?

J. Bethune, Q. C., and P. C. Macnee, for the plaintiff. The case *Linfoot v. Duncomb*, 21 C. P. 484, decided the dowress was not entitled to damages when she took judgment for her dower upon the appearance and consent of the defendant, for that she cannot have a separate judgment for damages. The other cases do not agree with that decision. But to avoid the difficulty relied upon in that case, the dowress has not taken judgment of seisin yet. We refer to *Harvey v. Pearsoll*, 31 C. P. 239; *Cameron v. Gilchrist*, 43 U. C. R. 512; *Ryckman v. Ryckman*, 15 U. C. R. 246; *Empey v. Loucks*, 8 U. C. R. 374; *Cameron v. Gilchrist*, 7 Pr. R. 184; *Hitchcock v. Harrington*, 6 Johns. N. Y. 290. The Dower Act enacts, by section 45, that all cases

not provided for by the Act should be governed by the law, as it was in force in Upper Canada, relative to suits and actions of dower, before the Act of 1850, 13 & 14 Vic. c. 58.

Z. A. Lash, Q. C., and *J. King*, for the defendants. There was no demand of dower until March 6th, 1882, and the writ issued on the 22nd of the same month. If damages are recoverable at all, they should not be given for a period further back than the 6th of March. By the statute the claim of dower is entirely governed: R. S. O. ch. 55, sec. 6. The defendants appeared and confessed the right to dower, and sec. 20 shews the effect of this. The claim is for detention of dower, and there can be no detention until after demand. The plaintiff must to the defence of "*tout temps prist*," reply a demand, which she has not done. The Statute of Merton is directed against wrongdoers, against those who *deforce* the dowress.

Under our Act, when there is detention only, the damages are not to be computed from the death of her husband; *Linfoot v. Duncomb*, 21 C. P. 484. The plaintiff was offered, when the defendants appeared, \$122 and her costs, and she would not accept that sum. In any case she should not, unless she got larger damages than \$122, receive any costs. We refer to *Daniell's Ch. Pr.* 4th ed., 1394; *Wellington v. Fox*, 3 M. & Cr. 38; *Cameron on Dower*, pp. 498-529.

J. Bethune, Q. C., in reply. Section 24 of the Dower Act must be interpreted by section 45. The statement of claim is in the form suggested in *Harvey v. Pearsoll*, *supra*. The defence of "*tout temps prist*" cannot be pleaded by any one but the heir-at-law, and cannot, therefore, be available to these defendants. The Court may hold that defence to be invalid, and if so, damages must relate back to the death of her husband: Judicature Act, sec. 44. The offer of costs has been done away with because the right of the dowress has been since the offer disputed by two pleas now abandoned. He referred to *Grieve v. Woodruff*, 1 App. R. 617. The evidence given

as to the state of the land at the death of the husband, and its probable yearly value, can be considered in disposing of the case.

June 6th, 1883. WILSON, C. J., J. P. D.—[After stating the facts.] It is singular there should be any difficulty in dealing with a claim of this kind. The husband died seized in fee of land. He devised it in fee to one of his sons, and he (the son) sold in fee to the defendant Fish.

The claim of the plaintiff as dowress is not denied, but her right to damages is disputed.

1. It is said that by the R. S. O. ch. 55, sec. 10, damages are given only for detention of dower, and not for *mesne* profits, and that damages are quite a distinct and separate claim from that of *mesne* profits.

2. That by sec. 23 damages are not given when the title to dower is admitted, although the defendant denies he is tenant of the freehold.

3. That by sec. 20 if the defendant appear and acknowledge the title of the dowress, no damages or costs are recoverable.

4. That damages are only recoverable when an appearance and no acknowledgment of the claim of the dowress is made, and then only damages for the detention of her dower: sec. 25.

5. And that a judgment of seisin obtained under sec. 20, is absolutely final and conclusive, and there is no provision in such a case entitling the demandant to any damages, nor is there any mode provided for ascertaining the same.

6. That if damages are claimed under that Act, they can only be recovered under sec. 25. But if they can be recovered under the Statute of Merton, that is, under the old law, they can be recovered only by virtue of sec. 45.

I think the Dower Act has been construed too rigidly, and without giving due effect to the very proper enactment, that in cases not otherwise provided for by the Act, the pleadings and proceedings shall be regulated by the law,

as it was relative to suits and actions of dower before August 10th, 1850.

By sec. 10 the dowress in every case may claim damages for detention of her dower: that means, of course, in all cases in which they can be claimed under the Act, and as I construe the 45th sec. in all cases not provided for by the Act, in which by the pleadings and proceedings they could have been claimed before August 10th, 1850.

The Act then provides for the following cases.

1. When the defendant appears and files a notice denying he is tenant of the freehold.

2. When the defendant files an appearance and does not deny he is tenant of the freehold.

3. When the defendant files an appearance and acknowledges he is tenant of the freehold, and his consent that the plaintiff may have judgment for her dower.

4. When the defendant does not appear.

In the first case the tenant admits the title to dower.

In the second case he admits his tenancy of the freehold.

In the third case he confesses both his tenancy and the title to dower.

In the fourth case on the rule of non-denial he admits everything.

In the first case the tenancy to the freehold must be tried, and in the second case the title to dower.

In the first case, by sec. 23, the plaintiff may without further pleadings take issue on the denial of the tenancy and make up the record, setting out the writ, the appearance, the denial, and the issue thereon, and go to trial, and if she obtain a verdict she shall be entitled to costs and to a judgment of seisin.

But what of the damages which she is entitled to claim, and may have claimed in the action?

In such a case nothing is said in that section of damages. And it will be observed that it is said the plaintiff may take issue at once on the denial and make up a record, &c.

She cannot, therefore, while claiming damages and having the right to them, and while also the 45th section is

in force, be compelled to give them up if she has been deforced of her dower by a positive, and it may be repeated denial of her right and a refusal to assign her her dower.

In the second case—that is, when the right to dower is not admitted—express provision is made by secs. 24 and 25 for the recovery of damages, if they have been claimed by the writ. That positive award of them on such an issue, although a very forcible argument against the allowance of them in other cases, is not in my opinion a conclusive answer.

The defendant in such an action may have refused to pay the day before it was brought, and he is to pay damages, whereas in the other case there are to be no damages, although the tenant has denied the right and refused the dower up to the very day of issuing the writ.

Then as to the third case, in which the defendant admits the tenancy and the right to dower, and in the fourth case in which the defendant does not appear at all, the plaintiff it is enacted *may* enter judgment of seisin, and sue out a writ of assignment of dower, in the third case without costs, and in the fourth case without costs unless the Court or Judge shall allow them, but nothing is said of damages in either of such cases.

It is not said she shall not recover damages, and it is not said she *may* take such a judgment.

I do not think there is anything in the general enactments of the statute, and certainly not with the aid of the special provision of the 45th section, to prevent the plaintiff from recovering her damages if she has claimed them, and would under the former law be entitled to recover them.

For in both such cases the widow may have been deprived of her dower, and the statute was not designed to protect such wrongdoers and to prejudice a person and an estate said to be so much favoured in law.

Another difficulty raised is, that the widow is by the statute in any event to recover damages for “the detention of her dower :” Secs. 10, 25 and 28 ; which expression it

said excludes *mesne* profits, or the third of the yearly value of the land, for the period for which damages are given.

I am not willing to accept such a construction of the Act.

The Statute of Merton mentions "damages, that is to say, the value of the whole dower."

In *Coke* on Littleton, 32*b*, it is said if the widow do not demand her dower, she may lose "the value after the decease of her husband, and her damages for detaining of her dower."

In *Park* on Dower, s. 306, referring to *Coke* on Littleton, 32*b*, in note 4, it is said: "By damages are to be understood, the profits of the third part since the death of her husband or the teste of the writ original (after deducting outgoings), and such damages as the wife has sustained by the detention of her dower, which are usually assessed severally, although damages given generally without finding the value of the land are good;" and the same is also stated in 1. *Roscoe* on Real Actions, 311-312.

The writ of inquiry is to determine the value of the land by the year, and the widow's third of that sum is her *mesne* profits for the time from which they are allowed, and to determine what the damages for detention are: *Park* on Dower, ss. 307-308; *Coke* on Littleton, 32*b*, note 4; 2 *Wms.* Saund, 44*d*, 44*e*, 45-45*a*, and note.

It is plainly laid down, that on the assessment the damages are computed severally for the *mesne* profits and the detention, and a release of damages for the detention will not be construed to extend to the *mesne* profits, for they are two distinct things: *Harvey v. Harvey*, Sir T. Ray m. 366.

But damages generally do cover "the value of the whole dower," and an assessment for the *mesne* profits and detention together is a good assessment.

It is true the Revised Statute mentions damages for the detention specifically, and not damages generally, but I am not satisfied that damages for the detention will not cover *mesne* profits as well, as they may be assessed together.

But if that is not so, then what I have before said of the effect and operation of sec. 45 will apply here as we are and under its saving enactment I am of opinion damages for *mesne* profits, the most substantial part of the whole compensatory demand, are still recoverable.

The construction I have placed upon the Act in both the views I have expressed is confirmed by the R. S. O. c. 108, sec. 16, which assumes *arrears of dower and damages for such arrears* are recoverable by the enactment, though "no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit, for a longer period than six years next before the commencement of such action or suit."

The words "for detention of dower" are in themselves large enough to include "the value of the whole dower which are the words of the Statute of Merton, although in practice for the purposes of assessment the *mesne* profits have been separated from the claim for detention.

Upon the whole, having examined this point with some care and considered it, I am of opinion the R. S. O. ch. 108 has not taken away or diminished the right of the dower to damages against all persons and in all cases where they were recoverable before August 10th, 1850, and that such damages are general damages as well for what are called *mesne* profits as for detention, and that such general damages are covered by, and included in, the words "damages for detention of dower," or such general damages are not taken away by that Act, but are saved by the 45th section, and may be recovered by the law as it was before August 10th, 1850, as "a case not otherwise provided for" by the Revised Statute.

I hold, therefore, the plaintiff may recover as well her share of the annual value of the land, at the value it was at the time of her husband's death, although I do not think why she should not have it in a case in which she demanded her dower from the time of her demand if it was refused to her, and also damages for the detention of it, in such a case be proved.

And it is said that such damages must relate back to the time of her husband's death, unless *tout temps prist* be pleaded; and it is further said that no one but the heir or devisee, I presume, can plead that plea, because the feoffee of the heir or any one claiming in the *per* had not the freehold immediately on the death of the husband, and so could not at all times from his death have been ready to render the dower.

So that a tenant in the *per*, which this defendant Fish is, is liable by such a doctrine to damages in every case from the death of the husband, however willing he may have been and may be to render her dower, and he is liable, although there may have been several successive tenants of the freehold between the death of the husband and his own purchase, for the damages for the whole time from the death of the husband: 1 *Roscoe* on Real Actions, 311; *Buller's Nisi Prius*, 117.

It is said the words of the Statute of Merton are, that those who are convicted of a wrongful deforcement shall yield damages, and it may therefore be a question if a feoffee of the heir or a person who is in by him in the *per* shall be charged with damages without a previous demand of dower, which would render him a deforcer, and damages being given *a morte viri*, the feoffee cannot plead *tout temps prist*: *Coke* on Littleton 33a; *Bac. Abr.* Dower (I.) So that unless a previous demand be necessary he may be charged without his default. It is safer when the feoffee of the heir is sued to make a previous demand of dower.

This being what would formerly have been called an equitable case, and the rules of equity now prevailing in all Divisions of the High Court—Judicature Act, sec. 16, sub-sec. 3—and the tenant of the freehold having it in his power to offer to make an assignment of dower: (R. S. O. ch. 55, sec. 3,) I think it may be permitted to a tenant to plead he has at all times since he became tenant of the freehold, been ready and willing to render the dower to the plaintiff, and if she desire to avoid that plea she should, if she can do so, reply a demand and refusal.

It was a harsh rule upon the tenant to be subjected to arrears of dower and damages before the time when he became tenant of the freehold, and when the dower had made no demand or claim of dower upon any one, to be answerable for all damages back to the death of the husband. Whether the tenant can now be made answerable for such antecedent damages, I will not say.

The plea of the defendant "*tout temps prist*" is no doubt not correct, and I will read it as if it applied to his term of holding only, but I think I shall do that only upon the terms of his paying the sum of \$122 he offered at one time to pay to the plaintiff, which, but for the plea of *tout temps prist*, which cannot be correct, and the absence of a more appropriate defence of tender, I could not have allowed to her. I think I should not have given her more than recompense for the third of the yearly value, and some allowance for detention from March 6th, a few days before the commencement of this action, which would have been much less than the sum of \$122, and I shall not allow her more than \$50 for her costs. And I give judgment of seisin for the said dower of the plaintiff, and for \$122 damages, and for the sum of \$50 for her costs, defendant's interlocutory costs to be set off.

A. H. F. L.

[CHANCERY DIVISION.]

BANK OF OTTAWA V. MCMORROW.

Promissory note—Stamp Act—Double stamping after repeal of the Stamp Act—Evidence—Onus—31 Vic. ch. 1, secs. 3, 7—42 Vic., ch. 17, sec. 13—45 Vic. ch. 1.

Where the defendant, being sued on a promissory note, alleged that the said note was not duly stamped before the repeal of the Stamp Act, nor until after action brought, although he had communicated the fact of that omission to the plaintiffs before he was sued, and the plaintiffs denied that the defendant had so notified them, and alleged that they double-stamped the note as soon as they had knowledge of the omission to stamp, which was not till after action brought, and after the repeal of the Stamp Act; and the evidence showed that when the note came to the plaintiffs' hands it appeared to be properly stamped:

Held, that the defendant could not be allowed, upon his own unsupported testimony, in such a case, to escape liability. The *onus* was on him to establish that the stamp was not duly affixed, and that the omission to duly stamp was so intelligibly communicated to the plaintiffs that it could be said they acquired the knowledge of the defect at the time alleged by him.

To cure a defect in stamping by double stamping forthwith was, under the Stamp Act, 42 Vic., ch. 17, sec. 13, an inherent right existing during the currency of the instrument, and accompanying its possession; and, by virtue of the Interpretation Act, 31 Vic., c. 1, sec. 3 and sec. 7, sub-s. 36, the same right still exists notwithstanding the repeal of the Stamp Act.

THIS was an action brought by the Bank of Ottawa against one Charles McMorrow. The writ was issued on June 6th, 1882. The plaintiffs alleged that the defendant on January 6th, 1882, by his promissory note promised to pay to the order of one R. E. Connor \$564 four months after date, which note the said R. E. Connor endorsed to the plaintiff, but it was not paid at maturity or since; and the plaintiff claimed the amount of the note, with interest and notarial fees.

In his statement of defence the defendant alleged that the said note was made in Canada before March 4th, 1882, to wit, on January 6th, 1882, and was liable to have be affixed thereto by the maker thereof adhesive stamps or to be made on stamped paper, or both, according to the statutes of Canada in that behalf; but the same promissory not was not at the time of its being made stamped at all

nor made on stamped paper, or both, in pursuance of the said statutes, nor was the said promissory note subsequently to its being made double stamped on or before March 4th, 1882, by any holder thereof; and the plaintiffs when they became the holders of the said promissory note had knowledge of the defects aforesaid, and the plaintiffs further neglected to affix double duty to the said promissory note by stamps on which was written the date of the affixing of the said stamps and the initials of the plaintiffs, or of any branch or agency of the plaintiffs, so soon as they acquired knowledge of the said defects; and the said note was therefore invalid, and of no effect in law or equity.

In reply the plaintiffs joined issue on the statement of defence, and also alleged that when the said R. E. Connor endorsed the said note to the plaintiffs, the said note had affixed thereto adhesive bill stamps to the amount of eighteen cents, with the day of the date of such note written on each of the said stamps and they (the plaintiffs) had no knowledge that such adhesive bill stamps had not been affixed to the said note by the proper party, or at the proper time, or had not been duly cancelled, or of other irregularity, or defect in the stamping of the said note pursuant to the statutes in that behalf, and the plaintiffs had no information or knowledge that the said note had not been duly stamped, or that the stamps thereon had not been duly cancelled or affixed by the proper party, or at the right time, or other irregularity or defects in the stamping of the said note, according to the statutes of Canada in that behalf, was obtained from the defendant after the commencement of this action, viz., on or about June 29th, 1882, and that on that day they, for greater security, paid the double duty on the said note by their cashier affixing to the said note adhesive bill stamps, and duly cancelling the same.

It appeared, in evidence, that the note when endorsed by the plaintiff was ostensibly properly stamped, that is, had affixed to it the required amount of stamps on which was written the day of the date of the making of the note.

The rest of the facts of the case sufficiently appear from the judgment.

The action was heard at Ottawa, on May 8th and 9th, 1882, before Boyd, C.

Christie, for the plaintiff.

Mahon, for the defendant.

Le Banque Nationale v. Sparks, 27 C. P. 320, and *Bradley v. Bradley*, 18 C. L. J. 438, were referred to.

June 6th, 1883. BOYD, C.—The note in question was made on January 6th, 1882, payable in four months. It came to the hands of the bank before it was due, and I suppose soon after its date and before March 4th, 1882. When it came to the hands of the plaintiffs it appeared to be properly stamped. The defendant says that this is not the fact, and that it was not stamped when he signed it, and that he gave notice of that fact before action to the bank's officer, and that the plaintiffs neglected to double stamp it till long after action, and after the repeal of the Stamp Act. The defendant swore affirmatively as to the note not being stamped when made, and as to his communicating the fact of that omission to the plaintiffs' officer before he was sued. The officer of the bank swore that he had no recollection of being informed of any failure to stamp the note, and did not believe he was told as alleged by the plaintiff. Upon this state of the evidence I think it would be unsafe to allow the defendant upon his unsupported testimony, in such a case, to escape liability. He signed the note, and it is not pretended that it is without consideration. The onus is on him to establish that the stamps were not duly affixed, and that the omission to duly stamp was so intelligibly communicated to the bank that it can be said they acquired the knowledge of the defect at the time alleged by the defendant before action.

There is no doubt a very convenient rule adopted in many cases, that when the positive fact of a particular conversation is said to have taken place between two

persons of equal credibility and one states positively that it took place, and the other as positively denies it, there credit may be given to both by holding that the words were said, and that the person who denies their having been said has forgotten the conversation: *Wright v. Rankin*, 18 Gr. 625. But as is said by Bramwell, L. J., in *Saffron Walden Building Society v. Rayner*, L. R. 14 Ch. D., at p. 417: "If it were to be laid down as a rule that affirmative evidence is always to be believed because the denial of it may arise from defect of memory, it would be like a good many other golden rules, very mischievous in its application." The defendant may have used such expressions in some conversation with the cashier of the bank as enable him to swear as he does, and yet he may have failed to convey to the mind of the officer the fact that the bank was not to rely upon the ostensible appearance of the instrument as being duly stamped. If the attention of the cashier had been aroused to this defect, I cannot but believe he would have promptly remedied it by double stamping. Upon the denial of the plaintiffs, and considering the interest that the defendant has in getting rid of his liability, my conclusion is, that if such a conversation as he speaks of did occur, he failed to convey to the mind of the officer an intelligent apprehension of the fact that the note was not duly stamped at the time it was made. I do not find as a fact that the bank acquired the knowledge of such defect till within a reasonable time before the double stamps were affixed. Upon this aspect of the evidence, the case I cite of *Saffron Walden Building Society v. Rayner*, L. R. 10 Ch. D. 696, and 14 Ch. D. 406, is a very instructive one.

The double stamp not being affixed till June 29th, 1882, it is objected that there was no power then to do so and the case of *Bradley v. Bradley*, 18 C. L. J. 438, is cited.

Reading the Act of 45 Vic. ch. 1, D. by itself there may be reason in that decision, but the attention of the learned Judge does not appear to have been called to the

Interpretation Act 31 Vic. ch. 1, O., sec. 3, and sec 7, sub-sec. 36, declaring that the repeal of an Act shall not affect any right existing or accruing before the the time of the repeal. Assume that this note was potentially invalid, and that it would become void upon its being made to appear that it was not duly stamped, a right thereupon arose under the Stamp Act, 42 Vic. ch. 17, D. sec. 13, to cure the defect by double stamping forthwith. This was an inherent right, existing during the currency of the instrument and accompanying its possession, which would not be displaced by the repeal of the Stamp Act. It was possible therefore, as I conceive, for the holders to affix the double stamp when they did, and there is no reason why justice should not be done by ordering the defendant to pay the amount of the ~~note~~ note with interest and costs (a).

A. H. F. L.

(a) See *Caughill v. Clarke*, 3 O. R. 269.

[CHANCERY DIVISION.]

FALKINER V. GRAND JUNCTION RAILWAY COMPANY.

Company—Directors—By-law—Appointment of solicitor—Repeal of by-law by shareholders—Payment by salary—C. S. C., ch. 66, s. 47.

Where the directors of a railway company passed a by-law, enacting that the salary of the plaintiff, as solicitor of the company, should be fixed at \$1,000 per annum, which by-law was afterwards, at a meeting of shareholders, repealed:

Held, that the by-law was within the competence of the directors, under C. S. C. ch. 66, sec. 47, and the shareholders could not undo the arrangement in respect of past services of the solicitor received by them. Without express power it is the right of the directors of a railway company to appoint necessary officers and agents of the company, and to provide for the manner of their payment.

The agreement to pay a solicitor a fixed sum as a yearly salary in lieu of paying items in detail, is neither illegal nor unusual, whether it provides for the past or the future.

THIS was an action brought by Nathaniel Baldwin Falkiner against the Grand Junction Railway Company claiming a sum of \$5,781.47 for his services as solicitor. In his statement of claim he alleged that by 44 Vic. ch. 64 O., it was enacted that a certain deed of amalgamation of the Grand Junction Railway Company and the Belleville and North Hastings Railway Company should be, and it was, declared legal and valid, and the two companies were amalgamated and united under the name of the Grand Junction Railway Company on the terms and subject to the provisions and conditions in the said deed contained that previously to the said amalgamation he had been appointed and had acted as the solicitor of the Belleville and North Hastings Railway Company: that he was appointed such solicitor on August 12th, 1874, by the board of provisional directors, but without any fixed salary being named, and he served as such solicitor from the said date till November 12th, 1878: that on January 2nd, 1878, by-law was duly passed and enacted by the said Belleville and North Hastings Railway Company as follows:

“Whereas, at a meeting of the board of provisional directors of the Belleville and North Hastings Railway

held on August 12th, 1874, N. B. Falkiner was appointed solicitor of the said Belleville and North Hastings Railway Company, and whereas he has acted as such ever since, and no salary or remuneration having been fixed, be it therefore and it is hereby enacted by the board of directors of the Belleville and North Hastings Railway Company, that his salary as such be and is hereby fixed at the rate of \$1,000 per annum from the date of appointment, in quarterly instalments."

The plaintiff went on to allege that his services were worth much more than \$1,000 per annum, and that he was entitled to that sum at least as a proper remuneration for his services as such solicitor, and that he was entitled to be paid at that rate for the services he so rendered: that by virtue of the amalgamation of the two companies the Grand Junction Railway Company was the successor and entitled to stand in the place of the Belleville and North Hastings Railway Company, and was subject to the liability and bound to fulfil the contracts entered into by the said Belleville and North Hastings Railway Company; and he claimed that the said Grand Junction Railway Company, the defendants, were bound to pay the same: that before the amalgamation aforesaid he paid for the said Belleville and North Hastings Railway Company and at their request the sum of \$132.55, expenses of a certain Act of the Ontario Legislature in regard to the said company, that is to say, to the clerk of the said Legislature the sum of \$100, the sum of \$27 travelling and other expenses, and \$5.55 to the *Ontario Gazette* for printing, which sum of \$132.55 had not been repaid; and he claimed damages to the amount of \$5,781.47 for his services aforesaid and said money paid and interest thereon from February 28th, 1882, costs of action, and general relief.

By their statement of defence the defendants admitted that the plaintiff acted as solicitor for the Belleville and North Hasting Railway Company in certain matters, but submitted that he was only entitled to be paid at the usual rate, and subject to taxation by the proper officer for

such services as he rendered to the company, and stated that he had not rendered any detailed bill with dates and items of his charges for such services, according to the statute in that behalf, one month before the commencement of this suit, and could not recover any part of his claim for the aforesaid reason.

They also alleged that no such by-law as alleged in the plaintiff's statement of claim was duly passed, and denied the power and authority of the board of directors of the said company to bind the company by any such by-law: that the said by-law was not duly passed in accordance with the statutes and by-laws affecting the said company and was passed by fraud and collusion between the plaintiff and one Lloyd and others, then wrongfully assuming to be directors: that the said alleged by-law was afterwards at a meeting of the board of directors, and also at meeting of the shareholders, repealed, annulled, and declared to be of no force or effect; and they also denied that the plaintiff paid at the request of the company the sum of \$132.55, as alleged by him.

The rest of the facts of the case sufficiently appear in the judgment.

The action was tried at Kingston, on May 28th, 1883, before Boyd, C.

A. R. Dougall, Q.C., and W. Cassels, for the plaintiff. The by-law was duly passed, and was a legal settlement for work done, and a binding contract of the board: *Jarvis v. Great Western R.W. Co.*, 8 C. P. 290. The repeal of it affected only the future, and not the past.

Hector Cameron, Q.C., for the defendants. The plaintiff is entitled to be paid for his services, but not on the footing of the by-law. The by-law was passed in collusion with the solicitor, as against the real owners of the road. Can directors pass a by-law fixing the remuneration for future as well as past services? The shareholders never assented to this by-law, and it was expressly repealed by them at the next meeting, in October, 1878. The plaintiff

had a by-law appointing him passed by the provisional board, he acted under this, and nothing more was done as to the amount of remuneration, until January, 1878, when the directors fixed it, and their by-law was repealed by the shareholders. There is a right at common law for shareholders to dissent from the action of the directors.

A. R. Dougall, Q. C., in reply, referred to C. S. C. ch. 66, sec. 47; *Galloway v. Corporation of London*, L. R. 4 Eq. 90; *Stevenson v. The Corporation of the City of Kingston*, 31 C. P. 333; *Smith v. The School Trustees of Belleville*, 16 Gr. 130.

June 6, 1883. BOYD, C.—There is no ground for impeaching the legality of the by-law on which the plaintiff relies, in respect of any irregularity or collusion as set up in the defence. The by-law was within the competence of the directors, (C. S. C. ch. 66, sec. 47); it formally ratified the appointment of the plaintiff as solicitor of the company, and provided for his compensation at the rate of \$1,000 per year, from August 12th, 1874. This by-law, passed on January 2nd, 1878, was repealed at a meeting of the shareholders held on October 1st, 1875.

It was understood from the first that the plaintiff should be paid, not on the footing of detailed services to be set forth in a bill of items, but by way of a fixed sum to be determined at a subsequent period. The by-law represents the fulfilment of that understanding, and it was intended to provide for a fair remuneration, (though lower than the ordinary allowance) for the services he rendered. There is no reason, considering all the evidence, for not awarding him compensation on the footing of this by-law, unless there is some legal obstacle. Two difficulties are urged by the defendants: first, that the by-law being repealed by the shareholders was as if it never had been; and second, that the directors had no power to fix for the future as well as for the past.

As to the first, I find no provision in the charter of this company giving the shareholders such a power as is

claimed. Without express power it is the right of the directors to appoint necessary officers and agents of the company, and to provide for their manner of payment. It is not competent for the shareholders, having received the benefit of the services of the solicitor, to undo the arrangement by which he is to be paid and leave the matter all at large. By the action of the directors, the solicitor took no steps to preserve the details of what he did, and is not therefore in a position to render a bill of costs with detailed items. It was never contemplated that he should do this; and it would be unfair now to place him at the mercy of the successors of the company who have had the benefit of his services. The repeal of the by-law can, in my opinion, affect only the future and not the past, and it is the measure of the value of his services during its currency: *Bill v. The Darent Valley R. W. Co.*, 1 H. & N. 303.

The agreement to pay the solicitor a fixed sum as a yearly salary, in lieu of paying items in detail, is neither illegal nor unusual, whether it provides for the past or the future: *Jarvis v. The Great Western R. W. Co.*, 8 C. P. 280; *Raymond v. Lakeman*, 34 Beav. 584; *Galloway v. Corporation of London*, L. R. 4 Eq. 70. Here the directors were not in the dark as to the nature or value of the services rendered and to be rendered; with a full knowledge of what could guide them in properly appraising the value of what was furnished, they fix the amount, and I see no ground for disturbing what they have done.

No contention was made that the plaintiff was not entitled to recover for the \$100 paid to the clerk of the Ontario Legislature, and it should be allowed. Credit must be given for the \$500 paid to the plaintiff on account of his salary by Mr. Lloyd, (which he says was afterwards borrowed from him by Mr. Lloyd,) if this is insisted on; but in this event I think the plaintiff should have taken the account taken against the defendants, with interest from the date of the first payment, under the by-law. He is also entitled to his costs of suit.

A. H. F. L.

[CHANCERY DIVISION.]

CLOW v. CLOW.

Will—Construction—Devise for life—Impeachment for waste.

A testator devised certain lands as follows ;—" I will, devise, and bequeath unto my wife for and during her natural life all that parcel of land (describing it) * * * I also will and bequeath unto her, my beloved wife, everything, real and personal, within and without ; and it is hereby understood that the property above described shall be under the control of my said beloved wife. After the demise of my wife it is my will and pleasure that the aforesaid real estate shall descend to my nephew and his heirs." The testator had no other real estate than the said lands, and there was nothing else to which his language, importing that his wife was to have control of everything, real and personal, could be referred.

Held, nevertheless, that the intermediate clause had no effect on the life estate expressly given to the wife, and there was nothing to change or enlarge the usual character of such life estate, so as to render her punishable for waste.

See *v. Briggs*, 15 Sim. 17, S. C. in App. 2 Phil. 583, distinguished.

THIS was an action brought by one William Henry Clow against Maria Jane Clow, claiming damages for waste alleged to have been committed by the defendant on the lands in question.

In his statement of claim the plaintiff set out that his uncle, William Clow, was at the time of his death owner in fee of the lands in question ; that on April 10th, 1881, the said William Clow died, having, by will, dated March 28th, 1881, devised the lands in question in the words in the judgment set out: that he, the plaintiff, under the said will, became the owner in fee simple of the said lands, subject to the life estate therein of the defendant Maria Jane Clow: that the defendant, since the death of the said William Clow, and before the commencement of this suit, had committed waste on the said lands by cutting and causing to be cut down a large number of valuable green timber trees and pollards, which were growing thereon, and converted the same to her own use: that she had also committed such waste by cutting down a large number of valuable shade and ornamental trees; and had thereby

greatly damaged and injured the lands and the value of him, the plaintiff: and he claimed \$200 and an injunction restraining further waste.

In her statement of defence the defendant admitted that the plaintiff was entitled in fee to the lands in question subject to her life estate, but denied that she was guilty of the acts complained of, or had committed any waste. She alleged that the only wood of any kind which had been cut or carried away from the said premises was decaying wood for firewood for her own use and the use of her tenants on the said premises, and the repairs of the fences on the said premises.

The rest of the facts sufficiently appear in the statement.

The case was tried at Brockville, on May 1 before Boyd, C.

Deacon, for the plaintiff. Waste is clearly established and we are entitled to damages, and an injunction.

Webster, for the defendant. The farm has not been cultivated as one farm. Besides, force must be given to the words of the will, which puts all the land "under the control" of the defendant: *Taylor v. Taylor*, 5 O. S. 501; *Biscoe v. Van Bearle*, 6 Gr. 43; *Wigle*, 24 C. P. 405.

June 6th, 1883. BOYD, C.—Surrounding circumstances were given in evidence to explain how the land was devised in this case to the defendant for life, and how the land to the plaintiff had been used during the life of the defendant. He and his wife, the defendant, had lived on the land, and property belonging to the wife which was a homestead, and from the land in dispute had been taken for the use of the premises on which they lived. Since the death of the husband the widow had been allowed to live on her own property and to draw part of the fuel from the testator's land. This land was a real estate he had, and he disposed of it by his will, "I will, devise, and bequeath

and during her natural life, all that parcel of land (describing it) * * I also will and bequeath unto her, my beloved wife, everything real and personal within and without, and it is hereby understood that the property above described shall be under the control of my said beloved wife. After the decease of my wife it is my will and pleasure that the aforesaid real estate shall descend to my nephew (the plaintiff) and his heirs." I was at the close of the case disposed to think that the intermediate clause had no effect on the life estate expressly given to the wife, and that there was nothing in the will to change or enlarge the usual character of such a life estate so as to render the tenant dispunishable for waste. Further consideration and a reference to the authorities have induced me to hesitate, but not to modify my views on this point. The testator had no other real estate than this land, and there is nothing to which his language importing that his wife is to have the control of everything, real as well as personal, can be referable unless it affects the land devised.

The general rule in such cases is that where the intention of the testator requires that an estate devised in terms larger than a mere life estate shall be cut down to a life estate in order to give effect to other conflicting dispositions of the same property, there the Court will deal with such a life estate as one unimpeachable for waste: *Stanley v. Coulthurst*, L. R. 10 Eq. at p. 265. But the case of *White v. Briggs*, 15 Sim. 17, and in appeal 2 Phil. 583, goes considerably beyond this. In *White v. Briggs*, the testator gave in the first clause of his will to his wife the full and entire use for her life of all his property, real and personal, and after the death of his wife to his nephew, and later on in the will came an express clause with regard to the land, to this effect: "After the decease of my dear wife my real property consisting of (giving description), I leave to my nephew and his heirs, or family." The Vice-Chancellor of England held, that according to the construction of the will, the real estate ought to be held for the use of the widow for life, without impeachment of waste. There was no appeal from this

part of his decree, and his decision is approved of in *Davenport v. Davenport*, 1 H. & M., at p. 779, although it there appears to be erroneously treated as falling under the general rule I have before mentioned. The language used by the testator in this case, that the property is to be "under the control" of his wife is not so comprehensive as giving her "the full and entire use" of it, and I do not regard *White v. Briggs*, as a case which should be extended to cover the present. There was no malicious or intentional damage done to the property, and I regret that I have to uphold my former view, that the defendant should pay for damages \$25 and costs on the lower scale.

A. H. F. — L.

[COMMON PLEAS DIVISION.]

UNION FIRE INSURANCE COMPANY V. O'GARA.

UNION FIRE INSURANCE COMPANY V. SHOOLBRED.

ions—Calls—Resolutions—By-laws—Notice—Stockholder—Head office, change of,

recover calls on stock.
 defendant's act of incorporation enabled the directors to make calls at times as they might deem requisite, provided that successive calls should be made at intervals of not less than two months between calls, that no call should exceed ten per cent., and that thirty days notice should be given of every such call.
 It was necessary that the calls should be made by by-law, but that a resolution was sufficient and that the resolution need not name the place of payment of the calls, but that this could be done in the notice.
 A resolution was passed by which a call was made of 10 per cent., payable on the 1st March, and it was thereby further resolved that a further call of 10 per cent. be made payable on 1st September.
 It was not a call of 20 per cent. but two calls of 10 per cent. each; and the fact of the second call being illegal did not invalidate the first, because contained in the same resolution.
 It was provided that the head office of the company might be changed to any other place as might be determined by the shareholders at any of the general meetings.
 At the general annual meeting a resolution was passed authorizing the company to consummate arrangements for the removal of the head office from Ottawa to Toronto. The directors made the change, and subsequent annual meetings were held at Toronto, at the first of which held, the by-law referring to the place of holding the annual meetings was amended by substituting Toronto for Ottawa.
 It was at the change was effectually made.
 The third call was objected to as being a fourth call, in that the call before referred to had been abandoned; but, the evidence clearly shewed such abandonment.
 The call was made by resolution of the 3rd August, payable on 1st September, and notice of it was mailed at Toronto on the 5th, addressed to defendants at Ottawa, but not received until the 1st of September. *Held*, sufficient, following *Union Fire Ins. Co. v. Fitzpatrick*, 32 C. P. 602.
 As to fifty shares personally subscribed by the defendants O. and upon which they were held liable, the plaintiffs claimed that they were held liable, respectively, of 75 and 60 shares, for which they had not received the dividends.
 The evidence, set out below, that O. was not such holder, but that the shares were held by the company, and was therefore liable thereon.

These were actions for calls on stock.
 The causes were tried before Osler, J., without a jury, at the Summer Assizes of 1883.

The facts and arguments of counsel are sufficiently stated in the judgment.

Foster, and *J. B. Clarke*, for the plaintiffs.

J. K. Kerr, Q.C., and *C. R. W. Biggar*, for the defendants.

December 1, 1883. OSLER, J.—The plaintiffs seek to recover the amount of two calls of ten per cent. upon 110 shares of \$100 each, held by the defendant O'Gara, and 125 shares held by the defendant Shoolbred in the capital stock of the company.

There are three questions involved.

1. As to the number of shares held by each defendant.
2. As to the legality of the several resolutions making the calls.
3. As to the sufficiency of the notices of the calls.

I will first consider the second and third questions, as I apprehend there can be no doubt that each of the defendants is the holder of at least fifty shares. Each of them has subscribed for that number in the stock subscription book of the company, an act which alone is sufficient to constitute him a shareholder: *Union Fire Ins. Co. v. Lyman*, 46 U. C. R. 453; *Union Fire Ins. Co. v. Fitzsimmons*, not reported, before Cameron, J.; 39 Vic. ch. 93, sec. 2, O.; and as to the defendant O'Gara, the scrip certificate of allotment was also proved. See also the minute book, p. 53 and App. p. 469, resolutions of directors moved and seconded by these defendants allotting the stock, 15th October, 1877.

The Act referred to provides (sec. 7) that the director "shall have power to make calls upon the shares of the respective shareholders at such times as they may deem requisite * * * provided always that successive calls on the stock shall be made at intervals of not less than two months between such calls, and no call shall exceed ten per cent., and thirty days' notice shall be given of every such call."

At a meeting of the directors, held on the 14th January

1881, a resolution was passed which, as originally entered in the minute book, was as follows:

"On motion of Mr. Patterson, seconded by Mr. Allan, it was resolved as follows: That a call of ten per cent. upon the capital stock of this company be and is hereby made, payable on the 1st March, 1881; and it is further resolved that an additional call of ten per cent. be also made, payable 1st of September, 1881, in accordance with the Act of incorporation of this company."

It now appears in the book thus:

"On motion," &c., 'seconded,' &c., "it was resolved that a call of ten per cent. be and is hereby made, to be payable on the 1st March, 1881, at the head office."

"Moved by Mr. Paterson, seconded by Mr. Allan, that an additional call of ten per cent. be also made, 'payable 1st September, 1881, in accordance with the Act of incorporation of this company.'"

The minutes are signed at the foot thus: "19th January, 1881. Confirmed, James Patterson, vice president," but the minutes of the meeting of the 19th January, 1881, do not refer to the change.

On the 17th of January notice of a call of ten per cent. made on the 14th of January, and payable at the head office of the company, No. 28 and 30 Toronto Street, in the city of Toronto, on the 1st of March, 1881, was sent to each of the defendants. The notice was accompanied by a circular letter, dated 17th of January, stating that in order to enable the company to extend their business, &c., it was necessary to call in twenty per cent. upon the stock of the shareholders, and that a resolution had been passed by the board to that effect, making the twenty per cent. payable in two instalments on the 1st of March and 1st of September. The letter further stated that the enclosed notice referred to the first instalment, and that notice of the second would follow in due course.

As to this call it was objected (1) that as the resolution was originally framed no place of payment was named. (2) That as altered the place of payment was not suffi-

ciently indicated by providing that it should be payable at the head office. (3) That the head office had not been legally changed from Ottawa to Toronto.

As to the notice of the call, it was objected that the resolution, as originally framed, was one making a call of twenty per cent., that it was altered to its present form after the notice of call had been given, and therefore that no notice had been given.

I think the defendant also contended that there should have been a by-law authorizing the call. This objection I overruled at the trial, following my decision on the same point in another action at the suit of these plaintiffs. I have no doubt a resolution is sufficient.

I think none of the other objections are entitled to prevail.

I look upon the resolution of the 14th January, as one making two calls of ten per cent., the first payable on the 1st March, and the second on the 1st September, 1881. That is what the resolution itself says. It is not a single call of twenty per cent. payable by instalments; nor can the manager's letter of the 17th January, enclosing notice of call, make it such by calling it so. The second call made by the resolution was illegal, because made at a time not authorized by the statute; but how can that invalidate the first and legal call, even if embraced in the same resolution?

If necessary to do so, I should find as a fact that the alteration relied on as invalidating the notice was made at the meeting of the 19th January, but I think nothing can turn upon it, for it does not appear to me to alter the effect of the resolution in any degree.

As to the legality of the first call I may refer to *Moore v. McLaren*, 11 C. P. 534.

Then as to the omission to mention in the resolution: a place where the call should be payable. This is not required by the Act of incorporation.

In *Lindley* on partnership, 3rd ed., vol. i., p. 651, it is said: "Although the persons making a call may also be re-

red to determine when, where, and to whom the call is to be made, it is not necessary that they should do this by the resolution making the call. It is sufficient if these particulars are stated in the notices issued in pursuance of a resolution ;" and see also *Provident Life Assurance Co. v. Wilson*, 25 U. C. R. 53, where the call was held defective because it did not contain particulars required by statute.

The notice in this case gave the necessary information, and it was not proved or argued that it was not issued by the authority of the directors.

It is said that the head office was not legally changed. It was originally at Ottawa.

The 10th section of the Act provides that it may be changed to such other place as may be determined by the shareholders at any one of the general meetings.

At the general annual meeting held on the 29th March, 1881, the incoming board of directors were authorized to consummate arrangements for the removal of the head office from Ottawa to Toronto as soon as the necessary preliminaries for that purpose should have been made.

It was argued that this was not sufficient ; and that the shareholders could not depute the directors to consummate arrangements, but should themselves have passed a resolution declaring the change to be effected.

The court should have thought the resolution referred to was a sufficient indication of the will of the shareholders, but even in connection with the facts which appear in the minute book, that subsequent annual meetings of shareholders were held at Toronto, at the first of which (held on the 22nd January, 1879), the company's by-law No. 1, relating to the place of holding the annual meeting, was amended by substituting Toronto for Ottawa, I am satisfied that the head office was effectually changed. I saw this amended by-law to be put in, if necessary.

I find as a fact that notice of the January call was duly given to the defendant.

I find, as to the call made in the month of August, 1881.

This was made by a resolution of the board of directors, passed at a meeting held on the 3rd August, 1881. It was resolved that a call of ten per cent. be now made, payable at the head office, in the city of Toronto, on the 6th of September next, "said call with the two previously made, making thirty per cent now called in."

Notice of this call was given to the defendants by depositing in the post-office at Toronto a letter containing it addressed to the defendants, at Ottawa, on the 5th August, 1881.

It was shewn that these letters would not arrive in Ottawa until after the closing of the post-office, on the evening of the 6th August. If the defendants had applied for their letters that evening they could have had them, notwithstanding the closing of the office, but the letter addressed to O'Gara was not, in fact, delivered to him until the 8th August, the intervening day being Tuesday. It did not appear when the letter sent to Shoolbred was received by him.

Following the decision in the case of these plaintiffs, *Union Fire Ins. Co. v. Fitzsimmons*, 32 C. P. 602, I shall hold that thirty days notice of the call was sufficiently given.

It is, however, contended that the August call itself is invalid, there being nothing to shew that the former illegal call of the 14th January had been abandoned, or that the August call was in lieu of it.

In *Lindley on Partnership*, 3rd ed., vol. i., p. 652, it is said that if a call is made too soon, and is then abandoned in order to be replaced by another duly made, the irregular call should be declared void before the second is made. The authority cited there is *Welland R. W. Co. v. Berrie*, 6 H. & N. 411. That case only decides, as a question of pleading, that the company should shew that they had never had the benefit of the calls, for that *non constat*, though they were invalid, the company might have received the greater part of the money called for.

Martin, B., says: "If the plaintiffs" the company "had

and simply traversed the allegation in the plea that the call was made in excess, the real question might have been tried, and decided upon that issue."

Here I think it is amply proved and I so find as a fact, that the illegal call made on the 14th January was abandoned, and nothing was paid on it. The August call is treated as the third call. It would be the fourth if there had been two calls in January.

I find, therefore, that each of the defendants is indebted to the plaintiffs in respect of two calls of ten per cent. each on fifty shares of \$100 each held by him.

In addition to these shares for which the defendants undoubtedly subscribed, it is contended that the defendant Shoolbred is the holder of seventy-five, and the defendant O'Gara of sixty other shares.

These shares were never subscribed for by the defendants, nor is there any resolution or minute of the board shewing that they were formally allotted to them.

In the stock ledger of the company, under date 10th October, 1877, sixty shares are debited to each of them in their respective stock accounts in that ledger. Similar entries are made against the other three directors, Messrs T. W. Currier, J. M. Currier, and P. H. Chabot.

Under date of the 26th September, 1877, but subsequent to the entry of the 10th October, the defendant Shoolbred's stock account is debited with fifteen shares, and the accounts of T. W. Currier, J. M. Currier, and P. H. Chabot. are also debited with similar number.

Mr. Simons, who was the general manager of the company at the time, says he must have had the individual authority of the defendants and the other directors to make these entries or he would not have made them. The defendants and Mr. T. W. Currier deny that they ever in any way authorized such an allotment or took the shares with which they have been thus charged.

The facts have been but obscurely elicited, and having no reason to think that the witnesses did not mean to speak the truth according to their recollection, I have not felt it easy to arrive at a satisfactory conclusion.

The plaintiffs were incorporated by 39 Vic. ch. 93 (1876) with a capital of \$1,000,000, divided into 10,000 shares of \$100 each. They had power to organize and elect a board of directors so soon as \$50,000 of the capital stock should be subscribed and 10 per cent. paid in, but no policy could be issued until \$100,000 of stock had been subscribed and ten per cent. thereof paid in.

By an Act of the same session, insurance companies were forbidden to transact business without first obtaining a license from the treasurer of Ontario, for which license it was necessary for such a company as the plaintiffs to deposit with that officer \$10,000.

Great difficulty was experienced by the plaintiffs in complying with these provisions, and so late as the month of September, 1877, although 1,263 shares had been subscribed, no more than \$6,538 had been actually paid thereon. Efforts were being made without much success to have more stock taken up in Toronto and London, where local boards were intended to be established. Meantime it appears to have been determined to make up the necessary sum by discounting the notes of the directors at Ottawa, Toronto, and London. One made by T. W. Currier, J. M. Currier, J. H. Chabot, and W. Shoolbred was discounted through McCord, the local agent in Toronto, for \$1,000; another by the same makers through one Lean, the local agent in London, for \$2,000; and a third made by the five directors for \$3,000, discounted at La Banque Nationale in Ottawa. The first and third of these notes only are in question.

On the 26th September, 1877, there is an entry in the cash book, p. 7, as follows:

"Dr. From A. T. McCord, special on note of Currier, Chabot, and Shoolbred, \$1,000," the amount being extended in a column headed "stock."

On the 10th October, the following entries appear in the same book.

"From T. W. Lean, 'special' for note of Currier, Chabot, and Shoolbred, \$2,000."

" Amount of note given by
 " J. W. Currier, 10%, 60.
 " M. O'Gara, " "
 " P. H. Chabot, " "
 " W. Shoolbred, " "
 " T. W. Currier, " " \$3,000."

The figures "10%, 60," are inserted in red ink, close to the names in the same column.

On the following day, the sum of \$10,000 was paid to the provincial treasurer, and the license procured.

I have said that the stock ledger shews that defendant O'Gara is debited with sixty shares, under date 10th October, and the defendant Shoolbred with sixty shares on that date, and also, following it, with fifteen shares, as of 26th September; the entries in the cash book relating to the latter may be noted here.

At the foot of page 7, and referring to the \$1,000 received from McCord, on account of Curriers, Chabot, and Shoolbred, is this memo. in red ink. * "Towards payment of this note \$400 was contributed by A. T. McCord, jr., (see entry folio 20, marked x) and the balance in equal proportions by J. M. Currier, T. W. Currier, and P. H. Chabot, J. W. Shoolbred representing ten per cent. on sixty shares, being fifteen shares each." The entry referred to in folio 20 is this: "Dr. A. T. McCord, jr., \$400, money advanced by him to assist in retiring note of Curriers, Chabot, and Shoolbred, which was placed to credit of 'special' stock account, 26th September, it having been the intention of Mr. McCord to have placed the amount in stock in Toronto, \$400; Cr. special stock account of A. T. McCord, jr., per contra, \$400."

The date of this entry is probably late in March, 1878, as it is the last but three in that month. I doubt if it is any guide to the actual date of the receipt of the money. See L. B. 17, January 1878, Simons to McCord.

On the 13th October, 1877 a meeting of directors was held, at which the shares subscribed for were formally allotted, and on pages 469 and following pages a list of

the shareholders is set forth, with the number of shares allotted to each, amounting in all to 1,263. It includes the shares upon which I have held these defendants to be liable, but not those now in question.

Mr. O'Gara's evidence is that about the 10th of October, or at all events a few days before the meeting of the 13th, at which this allotment was made, and when the mode of raising the necessary funds was still under consideration or being completed, he had insisted that whatever was done, the amount to be paid should represent stock, and that he would not be a party to obtaining the license in any other way; that is to say, that the \$10,000 must represent ten per cent. paid up on 100,000 shares of stock. He said he refused to take any more stock himself, but was willing to be a party to the note by way of accommodation to the others: that it was then arranged that the \$3,000 should be treated as a payment of ten per cent. on 300 shares placed in the name of J. M. Currier in trust, and the \$1,000 as a similar payment on 100 shares held by A. T. McCord in trust, the trust in each case being for the sale of that number of shares and the application of the first payment of ten per cent. thereon in relief of the liability of the directors on the notes.

At the foot of the share list I have referred to, was then made, according to Mr. O'Gara's evidence, the following entry: "J. M. Currier, in trust for Mr. Chabot, Mr. Shoolbred, and T. W. Currier, 300 shares, \$3,000; A. T. McCord jr., in trust, 100 shares, \$1,000." The words "for Chabot, Shoolbred, and T. W. Currier" were inserted by Mr. O'Gara at the time by way of precaution and to emphasize the fact that he had nothing to do with the shares. The rest of the entry is in Mr. Simons's handwriting.

I observe that in the list referred to the \$3,000 and \$1,000 are added to the \$6,538 paid up on the 1,263 shares thus shewing \$10,538 paid up on shares, a circumstance which seems to support the defendant O'Gara's statement that the whole entry was made at a time when it was being ascertained whether a sufficient sum had been paid in on account of stock to meet the deposit.

The defendant Shoolbred and Mr. T. W. Currier had no recollection whatever of the arrangement spoken of by Mr. O'Gara, and while denying positively that any authority was ever given to Mr. Simons to place the shares in their names, their evidence does, I think, come to this, that they were to be repaid out of sales of stock to be afterwards made, or of the first stock to be taken up, and that a certain quantity of stock was to be set apart to secure them against their liability on the \$3,000 note.

Matters remained in this position, according to Mr. O'Gara's evidence, until the end of March, 1878, when the head office was about to be removed to Toronto, and it was then that a discussion arose, and at his instance, as to the stock being distributed. He thought that scrip should issue for it before the office was removed, and it was made out accordingly. His fellow directors asked him if he would take his share of it, which he refused to do, reminding them that the distinct understanding between them was, that he should have nothing to do with the stock. He suggested, however, that they might issue scrip for sixty shares to a person he would name—a person of no means, a clerk in his office, and thus relieve themselves of a share of the responsibility. While refusing to take any scrip themselves, they adopted this suggestion, and scrip for sixty shares (one-fifth of the 300) was issued to this man, one John O'Mara. The other scrip certificates for seventy-five shares each (60+15) were made out by the manager for each of the other four directors, and remain in the scrip book, but were not signed or issued.

If I could come to the conclusion that the defendants deliberately instructed their manager to debit them severally with these shares, treating the \$3,000 as their first payment or deposit of ten per cent. thereon, I should have no difficulty in holding them to be shareholders. A person may make himself liable to be treated as a shareholder in many other ways than by subscribing for shares and obtaining a formal allotment, and one who caused his name to be entered on the company's books as a share-

holder in respect of shares taken for the purpose of making up the statutory amount, would, on principle, clearly be estopped from afterwards saying that he was not the holder of such shares.

On the other hand, "persons cannot be made shareholders without their consent; and if a company or some other person has placed shares in a person's name, and complied with all the formalities requisite to make him a member, he will nevertheless not be a member, unless he has by agreement or otherwise authorized the acts in question, or ratified them, and thereby assented to take the shares:" *Lindley on Partnership*, vol. i., p. 132.

I am disposed, on the best consideration I have been able to give to the evidence, to adopt that account of the transaction given by Mr. O'Gara, and to find that the real arrangement was, that the 300 shares should be placed in Mr. Currier's name in trust for himself and the three others. I think this account is borne out by the whole entry at the end of the share list, the genuineness of which was not impeached, and by the fact that when the stock was allotted on the 13th October, three days subsequent to the discounting of the note, only fifty shares were allotted to each of the directors.

Further, it appears more probable that these 300 shares, from the sale of which the makers of the note were to be indemnified, and in which therefore all were equally interested, would, at all events before the note was paid, be placed in the name of some one individual as trustee for the whole of them, than that it would be distributed, and an equal proportion allotted to each. I have the distinct and positive denial of three of the directors that they ever authorized such an allotment, and a reasonably clear and intelligent explanation from one of them as to what was really done; an explanation which is corroborated in the manner and to the extent I have alluded to.

I think it is probable Mr. Simons made the entries as they appear in the book, because he understood that the makers of the note were to be indemnified out of the shares

of the stock to be set apart for them, and it may have been **at one** time contemplated that they should take the shares **individually**, as the question of raising the money by **discounting** these notes had been under discussion for months, **as the** plaintiffs' letter book shews. If Mr. Simons had **such an** impression, it is very likely he would make just **such an** entry as he did make when he discounted the **\$3,000** note which, or one for which it was a substitute, **had been** in his hands, as I see from the plaintiffs' letter **book**, probably as early as the month of July, and was **only** made use of when the proceeds of the Lean and **McCord** notes had been actually received.

Mr. Simons, moreover, does not profess to speak from a **personal** recollection of instructions given to him by the **defendants**, or the other directors. He says he must have **had** such instruction otherwise the entries would not have **been** so made. He says they were made at the time. If **they were**, I think they were made rather under Mr. **Simons's** impression as to what ought to have been done, **or had been** formerly spoken of, than from instructions **actually** received.

I therefore find as to the sixty shares that the entries **as they** appear were unauthorized, and as to the defendant **O'Gara**, that he is not the holder of the sixty shares with **which** he is so charged.

I have not overlooked the evidence of Squires and **McCord**. It seems to me quite consistent with O'Gara's **contention** that he was not a shareholder in respect of the **sixty** shares, although he was desirous of being indemnified in respect of what he had paid on the note, in the **way** in which it was understood the plaintiffs should **indemnify** them, viz, out of sales of shares.

This, if there were no other evidence, would be equivalent to finding in favour of the defendant Shoolbred also, as **the** trustee, Currier, and not he, would be the shareholder.

"Where shares are held by A. in trust for B., and B. has **done** nothing to render himself a shareholder, * * and has **never** acted or been treated as a shareholder, he is not a

shareholder, and is not liable to be sued by the company for calls, although A. may be insolvent :” *Lindley on Partnership*, vol. i, p. 132.

Before I consider the other evidence which is relied on to fix the defendant Shoolbred with this liability, I must refer more in detail to that which relates to the fifteen shares.

Mr. Simons says : “ We sent up a note to McCord to be discounted, and it was appropriated in this way—referring to the entry at the foot of page 7—so many shares to the credit of the gentlemen enumerated here ; each of them paid their proportion ; they took up the note I believe. There must have been instructions respecting the stock, otherwise the entry would not have been made.” “ Had you received Shoolbred’s authority for crediting it that way ?” A. “ I certainly should never have made that entry, if I had not the authority to make it.”¹

It is clear to my mind that the entry could not have been made on the 26th September, when the note was discounted. At that time the note, as appears from the cash book and the pencil memo. in the minute book already spoken of, was debited to stock account as a special advance received from McCord, and as a payment of ten per cent. on 15 shares which he took, or were placed in his name, as trustee, not on sixty shares allotted to the four makers of the note. Whatever instructions were given must have been given after they had been compelled to take it up, and probably subsequent to the 17th January, 1878. The defendant did not deny that such instructions were or might have been given. Merely he did not recollect anything about the matter, and was not prepared to contradict Mr. Simons. No reason can be suggested why Mr. Simons should have made *these* entries without instructions. I have no ground for thinking that they were made in error, and, taken in connection with the other facts I am about to advert to, I think they are sufficient to fix the defendant as the holder of these fifteen shares.

On the 9th January, 1879, a special meeting of

board, at which both defendants were present, was held at **Ottawa**, for the purpose of considering a letter from **Mr. Aikins**, the vice-president. In this letter the writer, referring to a conversation recently held with **McCord**, in **Toronto**, desired to be informed whether the advance of **\$3,000** made by the directors, was on stock they intended to subscribe for, or on stock they intended to be subscribed for by others. To this letter the manager was instructed to reply, and in his reply to refer to the fact that when the company was organized, it was understood that of the **\$10,000** required by statute to be subscribed before the company could go into operation, **Ottawa** was to furnish **\$4,000**, and **London** and **Toronto** **\$3,000** each : that from **London**, **\$1,860** had been received, from **Toronto**, **\$1,600**, while **Ottawa** had not only furnished **\$4,481**, but in order to get the company started, *certain of the directors in Ottawa* had paid the deposit on 300 *additional shares held in their own names*.

A draft of the reply was read and approved of, the important part of which, assuming the letter sent on the 10th January to be a copy, is as follows: "When the company was being organized, it was understood, &c., &c., and from **Ottawa**, **\$7,481**. This last sum includes **\$3,000**, which in order to get the company started, the directors have paid, being a deposit of ten per cent. on 300 shares in addition to those previously held by them on which they had paid **\$1,900**. *This stock is held in their own names, but they reserve to themselves the right to sell it whenever the opportunity to do so may occur.* **Toronto** and **London** are therefore behind, &c."

The minutes of this meeting were confirmed on the 17th January, 1878, and are signed by the defendant **Shoolbred**, as chairman.

At a subsequent meeting held on the 20th March, at which both defendants were also present, it appears from the minutes that on a discussion arising as to the removal of the head office to **Toronto**, the following telegram was directed to be sent to a **Mr. Williams**, in reply to his of

the 18th March: "Will the London board take 5,000, if Toronto take a like amount. Office to be removed to Toronto, and board here relieved of \$36,000."

The minutes of the 25th March shew that an answer was received from Williams, that London would take 4,000, and that a letter from McCord was read, in which he said that Toronto would take \$10,000 of the \$36,000. In the minutes of the 27th March, there is a further reference to the \$36,000, for which the Ottawa directors had become responsible.

From these proceedings I infer: 1. That the 300 shares which are spoken of in the minutes of the 9th January, were not shares which *all* the Ottawa directors had taken. The expression is, that "certain of the directors in Ottawa had paid the deposit on 300 additional shares held in their own names," which is consistent with, and, to some extent, corroborative of the defendant O'Gara's statement that he had refused to take any of them. 2. That the other directors were under the impression that the shares were held by them jointly, or had been distributed between them proportionately, at all events that they were in their own names. 3. That between the 9th and the 20th March, their liability had been increased to the extent of 600 shares, evidently representing the \$600,000, which four of them had paid upon the McCord note of \$1,000, a fact which I regard as corroborative of Mr. Simons's evidence, and of the truth of the entries on pp. 7 and 20, of the cash book. 4. A distinct assertion by the directors interested of their ownership of these shares.

Mr. Aaron Squires, who had been inspector of the company, swore that in the fall of the year 1880, he called on the defendant Shoolbred for the purpose of buying this stock, having personally had some conversation with him on the subject of relieving him of it. The witness offered him ten per cent. upon what he had paid on it, but the defendant refused to sell it, unless he got all that he paid, as he did not think he had "a right" to lose anything on it. He

always admitted that he had fifty shares which he intended **to take**, but did not intend to hold the balance, which the **company** intended to relieve him of.

On cross-examination he said, that the defendant told **him** that in order to start the company and get the **Gov**ernment license and the amount required to be **sub**scribed, the directors in Ottawa had to subscribe **them**selves for the 300 shares, and make the note for \$3,000. **The** defendant on being recalled said, that this **conversa**tion, as he understood it, referred to forty shares of the **orig**inal subscription of which he wanted to be relieved on **the** removal of the head office to Toronto. In view of the **othe**r facts I have some difficulty in accepting this **expla**nation.

Lastly, it was proved that in January, 1881, a dividend **of six** per cent. was declared on the paid-up stock, and that **the** defendant Shoolbred received and was paid the **amount** of a cheque expressed to be in full of dividend No.

1. The number of shares is not stated, but the amount is **equivalent** to a dividend on seventy-five shares. The **def**endant said, that he took it as including the amount of **commission** which McCord owed him on some shares he **had** purchased for him. This McCord denied, swearing **that** the cheque was for the dividend, and for that only. I **must** take the cheque for what it professes to be.

On this evidence it appears to me that I am compelled **to find** the defendant Shoolbred liable as holder of the **seventy-five** shares in question. The scrip for the 300 **shares** was never actually issued to Currier in trust, and **we** have the facts (1) that a deposit of ten per cent. was **paid** upon them by the defendant and his fellow-directors; **(2)** the assertion of a joint ownership of the whole held **in the** names of certain of the directors or of some **pro**portion of the whole in the name of each director; **(3)** **the** actual allotment of seventy-five shares to defendant in **the** stock ledger, and **(4)** payment to the defendant of a **dividend** thereon. *Bloxam's Case*, 33 Beav. 529; *Pellatt's Case*, L. R. 2 Ch. 527.

These facts appear to embrace all that is necessary to charge the defendant as the holder of the shares, even though they may at first have been allotted or intended to be allotted to some one as trustee for him.

As to the set-off claimed by each defendant for moneys paid upon the notes, it is quite clear that they were to be repaid only out of the proceeds of the sales of the 300 shares, and the note was not a mere accommodation note.

There will, therefore, be judgment for the plaintiffs against the defendant Shoolbred, for the amount of two calls of ten per cent. on 125 shares, less \$500 paid on account thereof, in all, \$2,000, and interest thereon from 2nd April, 1882, the date of the commencement of the action, and against the defendant O'Gara for \$1,000, and interest from the same date, with costs in each case.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. HOWARD.

Municipal by-law—Fire limits—Repairing wooden buildings—Ultra vires.

A City corporation passed a by-law under R. S. O. ch. 174, sec. 467, sub-sec. 6, which defined fire limits, within which buildings were to be of incombustible material; the roofs to be of certain metals, or slate, or shingles laid in mortar not less than half an inch thick, and no roof of any building already erected within the fire limits to be relaid or recovered except with one of the enumerated materials. The defendant was convicted of a breach of this by-law, for having laid new shingles on his wooden house within the fire limits, without laying them in mortar. The house had been standing for many years before the by-law was passed. Held, that the by-law was *ultra vires*, in so far as it referred to existing buildings or ordinary repairs or changes thereof, not being additions thereto.

THE defendant was convicted on 7th August, 1883, by the Police Magistrate at Hamilton, for that he did unlawfully erect a building situate, &c., without putting half an inch of mortar under the shingles on the roof of said building, the said roof not being finished externally with tin, iron, zinc, copper, slate, tile, felt, or gravel, or any other material of an incombustible character, (said building being within the fire limits of said City of Hamilton,) contrary to a certain by-law of the council, passed 31st October, 1881, &c., and also contrary to a certain other by-law passed 12th May, 1873, entitled, "By-law No. 1, imposing fines and penalties for any breach of city by-laws," &c.

On January 15, 1884, *Clement* moved to quash the by-law. Unless the by-law can be supported under section 467, subsection 6, of the Municipal Act, the conviction must be quashed. That subsection, upon a proper construction of it, is limited, so far as roofing is concerned, to the roofing of buildings erected after the passing of the by-law, and to only such roofing as is done in connection with the erection of a building, and does not cover a case like this of repairs done to or alterations in roofing upon an old building.

Mackelcan, Q. C., contra. The by-law can be supported as coming under R. S. O. ch. 174, sec. 467, subsec. 6. The power to regulate the erection of buildings and to prohibit the placing of buildings other than with roofing of incombustible material within the fire limits is conferred by this section. The putting on of a roof is part of the construction of a building, and whether put on a new building or an old one within the fire limits, it must be made of such material as is required by the by-law. If the by-law could be enforced in cases only of the erection of an entire building, there would be nothing to prevent an owner, after the completion of his building, from removing the roof when it suited his convenience to do so, and substituting one which was not fire proof. The object of the statute and of the by-law was to provide against the spreading of fires, and this object would be defeated if new roofs which were not fire proof could, from time to time, be put upon buildings within the fire limits, being substituted perhaps for others which had been made in accordance with the requirements of the by-law. There is another section of the statute, R. S. O. ch. 174, sec. 466, subsec. 36, under which the by-law might be supported. The intention of the clause now objected to being to cause all buildings within the fire limits to be put in a safe condition to guard against fire. The powers of regulation conferred upon municipal councils will be liberally construed, so as fully to effect the objects in view. The prevention of damage by fire is an object within the scope of municipal authority under the general power of the corporation to provide for the safety of the inhabitants of the city: *Dillon on Corporations*, 3rd ed., secs. 141, 143, 405 and notes.

Clement, in reply. Section 466, subsection 36 does not support the by-law, as that subsection is pointed at the dangerous practice of allowing combustible material to accumulate in back yards and around outbuildings and sheds.

January, 22, 1884. HAGARTY, C. J.—No technical objections were raised, and the facts, not very clearly appearing in the evidence, were fully admitted, and a decision on the main question asked for. It was conceded that defendant's house was a wooden building nearly thirty years old: that it was shingled in the ordinary way, and that last summer new shingles were put on the roof instead of the old shingles, the old roof timbers being used; and that neither the old nor the new shingles were laid in mortar.

The by-law of 31st October, 1881, defines certain fire limits, and provides (No. 8) that "Every building or part of a building made, constructed, or placed within the fire limits shall be built of iron, stone, or brick," with many directions as to thickness of walls, &c.

No. 9. "All roofed buildings within said fire limits shall be finished externally with tin, tile, or felt and gravel, or in shingles laid in hair mortar not less than half of an inch in thickness, or with some other material of an incombustible nature, and no roof of any building already erected in the said fire limits shall be relaid, or recovered except with materials before enumerated."

The substantial objection is, that this latter part of the by-law is wholly *ultra vires*, and that the earlier part of the section is also open to a like objection.

The by-law was passed under R. S. O. ch. 174, which in sec. 467, sub-sec. 6 allowed the passing of a by-law,

"For regulating the erection of buildings, and preventing the erection of wooden buildings, or additions thereto, and wooden fences in specified parts of the city or town; and also for prohibiting the erection or placing of buildings other than with main walls of brick, iron, or stone, and roofing of incombustible material, within defined areas of the city or town; and for authorizing the pulling down or removal, at the expense of the owner thereof, of any building or erection which may be constructed or placed in contravention of any by-law."

This clause is repeated in the Act of 1883, ch. 18, sec. 504, sub-sec. 6.

When the Legislature gave power to regulate the erection of buildings, and to prevent the erection of wooden buildings they cannot be supposed to have intended to interfere with existing wooden buildings, of which, as they were well aware, the larger portions of all Ontario towns were composed. They desired apparently to provide for the gradual substitution of more enduring and less combustible edifices as wealth and business increased, and so soon as the wooden structures had perished by age, fire, or the desire of the owners for newer or better buildings.

They, therefore, allowed prohibition of the erection of buildings, or the placing of buildings other than with "walls of brick, iron, or stone, and roofing of incombustible material."

This seems clearly meant for future erecting, or building, not to affect existing structures, or ordinary repairs, or changes not involving the erection of a building.

The subject seems to have been clearly before the mind of the Legislature, as we find the words, "or additions thereto," in the clause; thus preventing a wooden building to be erected, or a wooden addition to a wooden building already erected. They thus seem clearly to admit the existence of a previously erected building; but the exception must not be extended by additions thereto of the same dangerous nature.

The provision as to roofing seems in my judgment wholly to apply to a building to be erected or placed after the prohibition. The introduction of the words, "or placed," points at the drawing or bringing of a wooden building already erected to a new locality.

I do not see how under this clause the owner of an existing wooden house can be prevented from repairing it with material similar to those used in its original composition, so long as his work does not assume the character of "erecting" a building.

Mr. MacKelcan argued strongly that to allow a new roof of the old material to a wooden house was to perpetuate the mischief.

We are not to argue as to whether the Legislature should **or should not** have gone further in giving these powers to **the** municipality. We have only to determine how far **they** have gone.

What has been enacted is a strong interference with the **rights** of property, considered necessary for the public good; **but** we must not carry it further than the ordinary **meaning** of the words will warrant. If the by-law be valid to **its full extent** it must practically prevent any repair, great **or small**, to the structure of a wooden house except with **the** prescribed materials.

An aperture of two or three feet in a wooden wall, or a **space** where the boards were rotten, could not be repaired **with** wood. A wooden roof, decayed or leaking in a yard or **two square**, could only be relayed with some incombustible **material**, or with shingles laid in mortar.

I am of opinion that the statute does not prevent the **repairs** of wooden buildings with the like materials used in **the** original construction—that it only applies to the **erection**, or creation, as it were, of new buildings or additions **thereto**, or the removal and placing of a wooden building **in a new locality** within the fire limits.

I do not consider that any of the other powers given by **the Act** under the head of "Preventing fires" (sec. 466) can **affect** this decision.

I need not discuss any other objection urged to the by-law, this not being a motion to quash.

I think the conviction must be quashed.

Conviction quashed.

[QUEEN'S BENCH DIVISION.]
ACKENZIE AND THE CORPORATION OF THE CITY
OF BRANTFORD.

1 Council—Public Health Act—Powers thereunder—By-law
Validity of—Delegation of powers.

Members of the Council of any municipality are health officers of the municipality by virtue of the Public Health Act, R. S. O., ch. 190, and they may enforce the provisions of secs. 3 to 7 of that Act by-law; but if they delegate their powers to a committee, they do so by municipal by-law. They cannot, however, delegate powers except those which they exercise under the Public Health Act, and those which the municipal Council of the city of Brantford has passed by the municipal Council, and imposing a fine of not less than \$1, nor more than \$50 for a breach of its provisions, regulating the cleansing of privy-vaults, and not under the Public Health Act, which restricts the penalty to persons by-law, as set out below, was objectionable, as delegating to persons not members of the Council, the powers which, as municipal matters, belonged exclusively to the Council.

JANUARY 18th, 1884, Beck moved to quash by-law No. 339 of the City of Brantford, or such parts thereof as might be unlawful, on the following grounds:

1. That the by-law was *ultra vires* and inconsistent with R. S. O. ch. 190, the city having no power to pass any by-law beyond the scope of the first seven sections of the said Act.
2. That sections 21 and 22 of the by-law were inconsistent with the 32nd section of the said Act, in that a heavier penalty was thereby imposed than was authorized by the said Act.
3. That section 11 of the by-law was *ultra vires*, unreasonable and oppressive, and in restraint of trade.
4. That section 17 of the by-law was oppressive, and in restraint of trade, and therefore *ultra vires* and unlawful.
5. That sections 21 and 22 of the by-law and the whole by-law were void and unlawful, on the ground that the by-law should have provided that one-half of the penalty should be paid to the informer or prosecutor, and that the by-law was oppressive, unlawful and unreasonable.

The motion was made on behalf of James Bovell Mackenzie, who described himself as a gentleman, and who said he was a resident of the municipality of Brantford.

An affidavit was filed, made by the city clerk, who said that the applicant was unmarried, and a student-at-law in the office of Valentine Mackenzie, barrister, at Brantford; and that Valentine Mackenzie applied for a copy of the by-law, and desired it to be delivered to the applicant, and that the applicant had been, for about a year or upwards, a student-at-law in the office of Valentine Mackenzie; that the assessment rolls did not contain the name of the applicant; and the deponent said he was informed the applicant was not in any way interested in the by-law, and the deponent believed the applicant had no means or property, and he did not believe the application was *bonâ fide*, but was made to put the city to expense and trouble, and that his name was used on this motion by the said Valentine Mackenzie.

The parts of the by-law objected to were as follow :

Section 11: "It shall not be lawful for any person within the city, for hire, to remove from any premises within the city night soil without being duly authorized to do so by the city council."

Section 13: "The person authorized under section 11 shall, within forty-eight hours after notice to him by the board or inspector, remove from the premises of any of the inhabitants of the city the night soil accumulated therein, * * provided no greater sum shall be charged the person from whose premises such night soil is removed than is named in the tender accepted by the council," &c.

The preceding section was in connection with section 9, which was: "Whenever any privy, privy vault, or drain shall become offensive or obstructed, the same shall be cleansed and made free, and, the owner, agent, occupant, or other person having charge of the land in which the same is situated, if in a condition contrary to the provisions of the by-law, shall remove, cleanse, alter, mend, or repair the same within a reasonable time after notice

in writing to that effect given by the board, or any of its officers; and in case of neglect or refusal, the board may cause the same to be removed, &c., and the owners or occupiers of the premises, on which such privies or drains are, shall be chargeable with the cost thereof, and shall also be liable to the penalty of the by-law."

Section 15: "No person to open any privy vault, cesspool, or to remove any night soil or other contents from the same, or to draw or carry any night soil or other contents of any privy, privy vault, or cesspool, through any street, lane, or other thoroughfare of the city, except the same be properly deodorised and enclosed in air-tight barrels or boxes."

Section 16: "No person shall engage for hire in the business of privy cleaning, or be permitted to remove any night soil within the city, unless and until he has first submitted his appliances for so doing such work for the approval of the board, and has obtained a certificate of compliance with the regulations of the by-law."

Section 17: "No person cleaning privies or removing night soil under the by-law shall charge more than three dollars, where the quantity is two cubic yards or less, or more than one dollar and fifty cents per cubic yard where the quantity is more than two cubic yards; and every such person shall use such disinfecting agents as may seem necessary and desirable during the removal of such night soil, and at the cost of the person so removing or cleaning the soil."

Section 21: "Penalty for breach of by-law, or neglect or refusal to comply with any of the provisions of the same, not less than one dollar, nor more than fifty dollars, exclusive of costs."

Section 22: "Whenever any matter or thing under this by-law is required to be done by any person, in default of the same being done by such person within forty-eight hours after notification, such matter or thing may be done by order of the board at the expense of the person in default."

Beck, in support of the motion. The by-law is one relating to the public health. The Public Health Act is the R. S. O. ch. 190, and the penalty under that Act for any violation of its provisions is not to exceed twenty dollars: *The Queen v. Johnston*, 38 U. C. R. 549. Sections 11, 16, and 17, particularly, are in restraint of trade. Sections 21 and 22 should have provided, according to the Municipal Act of 1883, secs. 422-424, for payment of half the penalty to the informer: *Snell and Corporation of the Town of Belleville*, 30 U. C. R. 81. Section 13, in connection with sections 16 and 17, is unreasonable and oppressive. This by-law was passed on the 2nd of April, 1883, under the Municipal Act, 46 Vic. ch. 18, which was passed on the 1st of February, 1883. Section 334 enacts that "a resident of a municipality, or any other person interested in a by-law, order, or resolution of the council," may apply to quash the same. The applicant, although only a *resident*, is a competent party to make this motion.

The Municipal Act of 1883, sec. 496, sub-sec. 6, gives the council power to pass by-laws for preventing or regulating the construction of privy vaults; sub-sec. 13, for providing for the health of the municipality, and against the spread of contagious or infectious diseases; sub-sec. 41, for making any other regulations for sewerage or drainage that may be deemed necessary for sanitary purposes. See also the Health Act, R. S. O. ch. 190.

Wilkes, contra. The applicant is not a *bonâ fide* applicant, as shewn by the affidavit filed. He should also be a ratepayer. The by-law was not passed under the R. S. O. ch. 190, but under the Municipal Act, and the penalty is not therefore objectionable. See secs. 421, 424, and sec. 482, sub-sec. 18. That Act, sec. 496, sub-secs. 13, 39 and 41, refer to privies, privy vaults, &c. The by-law is not in restraint of trade in any respect, and all acts to be done by the board of health are only in case of default of the party to attend to them. There is no provision in the by-law for the appropriation of the penalty, for the Municipal Act, 1883, sec. 424, provides for it. The Health Act,

R. S. O. ch. 190, applies only where the municipality has passed no by-law on the subject.

June 22, 1884. WILSON, C. J.—This by-law has been complained of on many grounds. The first and chief enquiry is under which Act, the Municipal or the Public Health Act, the by-law has been passed. The Health Act, sec. 2 enacts that the members of the municipal council of every city, &c., and the trustees of every police village, shall be health officers under the next five sections of the Act.

But any such council may, by by-law, delegate the power of its members, as such health officers, to a committee of their own number, or to such persons, either including or not including one or more of themselves, as the council thinks best.

Section 3 empowers health officers, or any two of them, in the day time to enter and examine premises.

Section 4 gives power to order cleaning of premises by proprietor or occupant.

By section 5, if the proprietor or occupant neglects or refuses to obey the directions, the health officers may employ persons to cleanse premises.

By section 6 the health officers, or a majority of them, may authorize two medical practitioners to examine, in the day time, and report on the health of any person therein; and if any one is found on the premises with a dangerous, contagious, or infectious disease, he may be removed to an hospital or other proper place.

Section 7 provides for the removal of persons from a house where there is any disease of a malignant and fatal character. The rest of the Act, with the following exceptions, applies only when the Lieutenant-Governor issues a proclamation applicable to the Province or to any particular part thereof.

The only other parts of the Act which requires to be noticed are the following sections:

Section 32 imposes a penalty, not exceeding twenty dollars, on any person who wilfully disobeys or resists any

Lawful order of the health officers, or wilfully obstructs **any** person acting under the authority or employed in the execution of the Act.

By section 34 the penalties are to be paid to the treasurer of the municipality in which the same have been incurred, for the use of the municipality.

The like provision is made by the Municipal Act 1883, sec. 493, which is made by sec. 2 above mentioned.

The health officers, whether the members of the council or their delegates, are empowered to enforce the provisions of sections 3 to 7, both inclusive, and for any infraction of them the penalty of twenty dollars is applicable.

The enactment of the Municipal Act 1883, as to the members of the council being health officers in their municipality, is that they "shall be health officers under *The Act respecting the Public Health*, and under any Act passed after this Act takes effect for the like purpose."

What the members of the council, as health officers, are empowered to do is therefore under the Public Health Act. By the by-law in question the council, in section 1, say they shall be health officers for the city, and that they may appoint a committee composed wholly of its own members and partly of other persons, as the council thinks best, to be known as the Board of Health, and such board, together with the council, shall possess all the powers vested in health officers by any statute of the Province of Ontario or of the Dominion of Canada.

The members of the council are health officers by statute, and as such they are empowered to enforce the enactments contained in sections 3 to 7, both inclusive, by their own inherent authority without any by-law.

If they delegate their power to a committee of their own number, or to other persons, including or not including one or more of themselves, that delegation must be by by-law, but that by-law is one which is and must be made by them as a municipal by-law; and under such by-law the persons so constituted health officers are to enforce the above provisions of the Public Health Act.

The Public Health enactments apply to the entry upon and examination of private property, dwelling-houses, &c., by the health officers in the day-time, to see if the same are cleanly, and for the removal of persons having contagious or infectious diseases, or the removal of persons from any house or outhouse where there is malignant or fatal disease, or if it is inhabited by too many persons, and the like. The purpose of the Act is entirely different from that of mere municipal order and cleanliness. The Act has no relation to the state of the streets, lanes, sewers, &c. The by-law requires the health inspector, under the board, to perform manifold duties outside of the Public Health Act, although they do relate also to the health of the inhabitants, such as keeping a vigilant supervision over all squares, streets, lanes and by-ways, and to examine all drains, &c.

It confers upon him the duties of an inspector or health inspector under the Municipal Act rather than under the Public Health Act. So far as the acts provided against are concerned relate to the enactments of the municipal law, the board of health has no right to interfere, because the council has no right to delegate its powers, excepting in matters under the Public Health Act.

The 11th section is not necessarily bad, for it does not prohibit any other person from doing such work, although a person tendering to do it may agree to do the whole of such work for the municipality.

Section 16 shews that others may do such work, and it is not bad because those who engage in the removal of night soil for hire are prohibited from exercising their calling, unless their appliances for the removal of night soil have obtained the approval of the board.

None of the clauses are bad, because they provide that if the party who ought to cleanse his premises, &c., &c., do not do so within forty-eight hours, which I think a reasonable time allowed to him for the purpose, the work may be ordered to be done for him, and at his expense. That is in effect the provision of section 485 of the Municipal Act, 1883.

I do not think section 21 invalid because the penalty is fifty dollars; because the by-law is really one passed under the municipal law, and for purposes specially provided for in that Act, and is not one under the Public Health Act.

But the objection to the by-law is that it delegates to persons not members of the council the powers which as municipal matters belong exclusively to the council. (a) There is not a clause of the by-law (excepting perhaps sections 5 and 6) which may not, as I am at present advised, be provided for under the municipal Act, and yet the powers are to be exercised by the Board of Health, and not by the council.

I am of opinion it would be better to repeal this by-law, and to enact a simple municipal by-law relating to nuisances and matters affecting the public health, the cleaning of privy vaults, &c., which are clearly within the municipal law, and to appoint an officer, if necessary, under section 482, to carry out the provisions of that by-law, and if required to pass another by-law (not by a resolution, as the present by-law enacts), delegating to a committee of the council, and to others associated with such committee, or to the others alone, the powers under the Public Health Act.

As I do not give effect to the motion made against the by-law upon any of the grounds of exception taken to it, I dismiss it, but without costs, and leave the city council to take such means as they may be advised with regard to the by-law.

Motion dismissed, without costs.

(a) The municipal council of the said city shall be health officers for the said city, and may from time to time, under this by-law, by resolution, appoint a committee composed wholly of its own members, or partly of its own members, and partly of other persons, as the council thinks best, to be known as the board of health, and such board, together with the council, shall possess all the powers vested in health officers by any statute of the Province of Ontario or of the Dominion of Canada.

[QUEEN'S BENCH DIVISION.]

REGINA V. DODDS.

Lottery Act, C. S. C. ch. 95.

The defendant, being the proprietor of a newspaper, advertised in it that whoever should guess the number nearest to the number of beans which had been placed in a sealed glass jar in a window on a public street, should receive a \$20 gold piece, the person making the next nearest guess, a set of harness; and the person making the third nearest guess, a \$5 gold piece; any person desiring to compete to buy a copy of the newspaper, and to write his name and the supposed number of the beans on a coupon to be cut out of the paper. The defendant was convicted of a contravention of C. S. C. ch. 95.

Held, that as the approximation of the number depended as much upon the exercise of skill and judgment as upon chance, this was not "mode of chance" for the disposing of property within the meaning of the Act.

Per HAGARTY, C. J.—The Act applies to the unlawful disposal of some existing real or personal property. In this case there were no specific gold coins, nor was there any particular set of harness, to be disposed of, which might have been forfeited pursuant to section three of the Act, and therefore the conviction was bad on that ground.

February 1, 1884. *Murdock* obtained an order *nisi* to quash the conviction of defendant as bad in law, and the offence not being one in contravention of the Lottery Act, Consol. Stat. C. ch. 95.

The conviction returned with the *certiorari* shewed that on 10th December, 1883, the defendant was convicted before the Police Magistrate, for that he did unlawfully advertise and publish unto one James Watson a certain unlawful proposal, scheme, and plan for giving and disposing of certain personal property, to wit, one gold coin of the value of \$20, a set of single harness, and one gold coin of the value of \$5, by a mode of chance, on the 24th December, &c., against the form of the statute in such case made and provided.

A \$20 fine was imposed, with \$3.35 to the informant for his costs, and in default of non-payment, distress, &c., ten days in gaol.

The information charged the offence in the same words.

It appeared in evidence that the defendant was the publisher of a paper in Toronto called the *Canadian*

Sportsman, and sold a copy thereof to one James Watson for ten cents.

In his paper, under date 23rd November, 1883, appeared the following:—

ARE YOU A GOOD GUESSER? IF SO, TAKE TWENTY DOLLARS, A SET OF HARNESS, OR A FIVE-DOLLAR GOLD PIECE.

Just as a bit of practice for those who think themselves good guessers We have placed in the window of P. C. Allen, the big newsdealer, No. 35 King Street West, a jar filled with white beans. These beans were emptied from a sack into the jar by Mr. Allen and sealed by his book-keeper; they will be counted by three prominent citizens in the office of the *Canadian Sportsman* on Christmas Eve, at 8 p.m. sharp, in presence of all who choose to attend. The person whose guess is nearest to the number in the jar will receive a \$20 gold piece; the one who is second best will receive a handsome set of single harness, nickel mounted, of the value of \$22; and the third nearest will get a \$5 gold piece. All guesses must be written out on this coupon, which can be cut from the columns of the *Canadian Sportsman*, and must be either initialled or marked by the guesser with his name and address. In no case will the name be made public. It will only cost you ten cents to buy a paper, and try your luck.

A \$20 gold piece, a \$22 set of harness, and a \$5 gold piece for ten cents.

Cut this coupon out, write your name and address plainly, and either deposit your guess in the special box in Mr. Allen's book store, or send it in to the *Sportsman* Office, No. 96 King Street West.

COUPON.

| |
|---------------------------------------|
| PRIZE—\$20 GOLD PIECE TO WINNER. |
| 2nd PRIZE—SET OF HARNESS, VALUE \$22. |
| 3rd PRIZE—A \$5 GOLD PIECE. |
| — |
| Number of Beans |
| Name or Initial |

This was the whole charge. The proceeding was taken under the Consol. Stat. C. ch. 95, and the Police Magistrate held that this was a scheme to dispose of personal property by a mode of chance.

February 7, 1884. *Fenton*, County Crown Attorney, in support of the conviction, referred to *Bishop* on Statutory Crimes, 2nd ed. 952; *Dunn v. The People*, 40 Ill. 465; *Tollett v. Thomas*, L. R. 6 Q. B. 521; 10, 11 Wm. III. ch. 17; *Buckalew v. The State*, 62 Al. 334.

Murdock, contra, contended that there could be no conviction until the illegal act took place: that there was no property disposed of by any mode of chance, the paper being the only thing disposed of: *Hirst v. Molesbury*, L. R. 6 Q. B. 130; *Watson v. Martin*, 34 L. J. Mag. Cas. 50; and that being a penal statute, the ordinary rule as to a strict construction should be applied.

February 16, 1884. HAGARTY, C. J.—The Act was first passed in 1856 (19 Vict. ch. 49.)

Its preamble was: "Whereas it is desirable that the practice of selling lands, goods, and chattels by lot or chance be prohibited by law, and any such sales declared void."

In the Consol. Stat. ch. 95, this preamble is omitted.

Sec. 1 enacts: "That if any person makes, prints, advertises, or publishes * * any proposal scheme or plan for advancing, lending, giving, selling, or in any way disposing of any property, either real or personal, by lot, cards, tickets, or any mode of chance whatever; or sells, barter, exchanges, or otherwise disposes of, or causes or procures, or aids, or assists in the sale, barter, exchange, or other disposal of, or offers for sale, barter, or exchange, any lot, card, ticket, or other means or device, for advancing, lending, giving, selling, or otherwise disposing of any property, real or personal, by lots, tickets, or any mode of chance whatever, such person shall, upon conviction thereof * * forfeit," &c.

Sec. 2 applies the penalty to any buying, bartering, exchanging, taking, or receiving any such lot, card, ticket, or other device, &c.

Sec. 3: "Any sale, loan, gift, barter, or exchange of any real or personal property by any lottery, ticket, card, or

other mode of chance whatever, depending upon or to be determined by chance or lot, shall be void to all intents and purposes whatsoever, and all such real or personal property so sold * * shall be forfeited to such person as will sue for the same by action or information," &c.

Sec 4: "No such forfeiture shall affect any right or title to such real or personal property acquired by any *bond fide* purchaser for valuable consideration without notice."

Sec. 6 extends its provisions to the publishing, &c., of any foreign lottery, &c.

Sec. 7: "The term 'personal property' in this Act shall include every description of money, chattel, and valuable security, and every kind of personal property whatever; and the term 'real property' shall include every description of land, and all estates and interests therein."

Sec. 9 declares that joint tenants, &c., in any real or personal property may still divide the same by lot or chance.

We are unable to see how the conviction before us can be supported on this statute.

The object of this enactment is plain. The preamble to the first Act clearly shewed its whole object—to prohibit the selling of lands, goods, and chattels by lot or chance.

Mr. Fenton was forced to contend that the gold \$20, the second prize of the single harness, and the third prize of \$5, were the goods and chattels to be thus disposed of.

This seems to be an unnatural and unwarranted application of the statute.

As we read it it must mean some existing real property, estate or interest therein, or some existing personalty which the party tries to dispose of in the manner forbidden by this Act.

The definition of the term personal property as including every description of money, chattel, and valuable security hardly help the contention.

An announcement that three prizes of \$20, \$15 (or a walking stick or set of harness), and \$5 cannot, we think, reasonably held to mean that these prizes were or are personal property spoken of in the statute to be disposed of.

The only thing in the case before us to be disposed of of sold seems to have been the defendant's newspaper, the e of which, at its ordinary selling price, it was calculated increase.

If the prosecutor's view be right, then this statute covers every description of lottery.

We have only to hold the promise to pay the money prizes set out in the prospectus or advertisement as the personal property to be sold or disposed of.

It appears certain that there was no specific gold coin of \$20, or any specific set of harness or \$5 to be sold or disposed of. At best it was merely a promise to pay these amounts, and give an article answering the description.

It would not be easy in this case to find the specific articles that under sec. 3 are to be forfeited to the person who may sue for the same, nor how to protect the *bond fide* purchaser without notice of any such real or personal property under sec. 4.

The extending the provisions of the Act to the advertising or selling, &c., of tickets in any foreign lottery does not, we think, make this Act applicable to the punishment by summary conviction of a "lottery" in the ordinary sense of the term.

The first Act was passed 19th June, 1856. It is fully noticed in *Cronyn v. Widder*, 16 U. C. 360. The Court held that the Imperial Act, 12 Geo. II. ch. 28, respecting lotteries, was in force in Upper Canada, and it is noticed that the Act 10 & 11 Wm. III. ch. 17, declares all lotteries to be public nuisances, but that perhaps it would not be held to apply to lotteries of the kind specified in 12 Geo. II. Mr. Justice Burns held that both these Imperial Acts were in force here, notwithstanding the Act now before us, 19 Vic. ch. 49.

Previous cases are there cited in our Courts, in which it is assumed that they are in force. See also *Corby v. McDaniel*, 16 U. C. 378. *Marshall v. Platt*, 8 C. P. 191, is to the same effect. See *O'Connor v. Bradshaw*, 5 Ex. 882, and remarks of Jessell, M. R., as to what is a lottery, in *Sykes v. Beadon*, 11 Chy. D. at p. 190.

Another objection is, that nothing was to be done by lot or chance. The articles (the beans) were exhibited visibly in a glass jar to all parties, and each person was to exercise his judgment as to the number, and put the result of his opinion on his ticket or coupon.

It was a chance, no doubt, in a sense that it would be difficult to most minds to make a really near approximation to the truth, but others might from training or turn of mind, or from accuracy of observation and facility of mental arithmetic, applied to the visible size and capacity of the vessel, make a more or less accurate estimate of the contents.

A trained eye could fairly approximate the cubic contents of a mass of rock or earth to be excavated in an engineering operation. The untrained would probably have to rest on the most baseless guess-work—on chance in fact.

For myself I am content to rest my judgment on the first ground. On the second, I incline to think the prosecution would also fail.

We think the conviction must be quashed.

We have had the advantage of reading the judgment, just delivered by the Common Pleas Division in *Regina v. Matheson (a)*, in which on a cognate question these Imperial statutes are considered.

ARMOUR, J.—I agree that this conviction must be quashed, and I do so upon the ground that what was proposed to be done was not to be done “by lots, cards tickets, or any mode of chance whatever,” but solely by the exercise of skill and judgment.

CAMERON, J., concurred.

Conviction quashed.

(a) See p. 559, post.

[QUEEN'S BENCH DIVISION.]

SHRIGLEY V. TAYLOR.

Penalty—Forfeiture—Action for—Election Act of Ontario, R. S. O. ch. 10.

In an action under R. S. O. ch. 10, sec. 182, against an agent for the sale of Crown Lands to recover a penalty alleged to have been incurred by voting at an election of a member to the Legislative Assembly, contrary to sec. 4 of the Act,

Held, overruling a demurrer to the statement of claim, that, though forfeiture and penalties belong to the Crown unless otherwise disposed of, the sum declared to be forfeited by section 4 of the Act for a breach thereof is a penalty within the meaning of sec. 182, sub-sec. 1, for which an action may be maintained by any person who will sue for the same.

THIS was an action against an agent for the sale of Crown lands in Ontario to recover the sum of \$2,000 alleged to have been forfeited by him under the provisions of section 4, R. S. O. ch. 10, he, as it is alleged, having voted, at an election of a member of the Legislative Assembly for the district of Muskoka.

The plaintiff sued for the same under the provisions of section 182 of said Act, which enacts: "That all penalties imposed by the Act shall be recoverable, with full costs of suit, by any one who will sue for the same," &c.

The provisions of section 4 are as follow: "The Chief Justice and the Justices of the Court of Appeal * * and agents for the sale of Crown lands * * shall be disqualified and incompetent to vote at any election; and if any public officer or person mentioned in this section vote at any such election he shall thereby forfeit the sum of \$2,000, and his vote at such election shall be null and void."

The defendant demurred, and stated as ground of demurrer that the plaintiff shewed no right to recover that section 4 declared a forfeiture without saying to whom it should be, and therefore it belonged to the Crown and must be proceeded for by action or proceeding at the suit of the Crown only, or of any private person suing as w for the Crown as for himself, as provided by section 29

The Interpretation Act, and not by "popular action:" that **sect**ion 182 only applied to penalties, and that a forfeiture **und**er section 4 was not a penalty.

Tilt, Q. C., for the demurrer.

Arnoldi, contra.

December 31, 1883. ROSE, J.—The argument is ingenious. We must endeavour to see if it is sound.

I have looked carefully in the law dictionaries and old reports to find if there is any distinction or difference of meaning between a "forfeiture" and a "penalty."

In *Tomlins's Law Dictionary*, under the Head of "Penal Laws," we find: "Where a thing is prohibited by statute under a penalty, if the penalty, or part of it, is not given to him who will sue for the same, it goes and belongs to the King," citing 2 *Hawkins*, P. C. ch. 26, sec. 17; and in the same work, under the head of "Forfeiture:" "In all cases where a penalty or forfeiture is given by a statute, without saying to whom it shall be, or a limitation for a recompense for the wrong to the party, it belongs to the King," citing *Strange* 50, 828; 2 Vent. 267.

In *Sweet's Law Dictionary*, page 222, sec. 8, "Popular Actions" are defined as being such as may be brought by any person, as in the case of a penal statute which forbids some act or omission, on pain of forfeiting a penalty to any such person as will sue for it;" and in *Wharton's Law Dictionary*, 7th ed., p. 614, under the heading of "Actions on Penal Statutes," we find "the penalties or forfeiture under these statutes are generally made recoverable by the Crown or the party aggrieved, or a common informer, as the case may be."

It would seem from these references that a penalty or forfeiture, unless it is otherwise enacted, goes to the Crown, and is recoverable in the same form of action or proceeding and the sum forfeited is designated a penalty.

In *Bradlaugh v. Clarke*, L. R. 8 App. Cas. p. 367, we find that Selborne, L. C., in referring to the Act declaring

that any member of the House of Peers or Commons voting without taking the oath should forfeit £500, makes use of the phrase, "the forfeiture of £500 is now the sole penalty;" and in the same case, p. 383, Lord Fitzgerald quotes from the reports of Sir Francis Moore the distinction taken by Chief Baron Manwood, "that where it is ordained by statute that for feaſance, miſfeaſance, or non feaſance, the offender ſhall forfeit a ſum of money, and it is not expreſſed to whom he forfeits it, in all ſuch caſes the forfeiture ſhall be intended for the Queen, ſave in caſes of injury to property where the penalty is aſſeſſed as compensation to the party injured." In *Vestry of Bermondsey v. Johnson*, L. R. 8 C. P. 441, "Penalty" and "Forfeiture" are apparently uſed as ſynonyms. So alſo in *Brown v. The Great Eaſtern R. W. Co.*, 2 Q. B. D. 406.

Attention was called on the argument to ſections 152 and 153, and 181, the only other ſections in the Act where the word "forfeit" was uſed. In ſections 152 and 153 the Act it is provided that the ſum forfeited ſhall be recoverable by any perſon ſuing for the ſame, and in ſection 181 that the ſum forfeited is forfeited to any perſon aggrieved; and it was argued that the omiſſion from ſection 4 of any ſimilar words indicated an intention on the part of the Legislature to keep the enforcement of the forfeiture in the hands of the Crown, attention alſo being called to the fact that the parties named in ſection 14 were public officers, ſome of high ſtanding in the public ſervice; alſo to the fact of the ſum forfeited being larger than would probably be given to any one ſuing for the ſame.

As to the amount of the penalty, I find that the ſame ſum is named as a penalty in ſections 177 and 179, and which it is clear can be ſued for under ſection 182.

As to the former argument, it will be neceſſary to review the legiſlation on the ſubject.

The rule of interpretation which may govern us is to be found in *Bradlaugh v. Clarke*, *ſupra*, pp. 358 and 379. Quoting from the page 379 Lord Watſon obſerves: "I do not think that in order to confer the right to ſue upon

common informer, express statutory words are required. It will be sufficient, in my opinion, if the intention of the Legislature to give him the right can be derived by reasonable implication from the language of the statute enacting the penalty. The creation of a penalty to be sued for by an informer is not in any proper sense an invasion, or even a limitation of the royal prerogative, and the intention to enact such a penalty may be indirectly expressed in words which would be ineffectual to deprive the Crown of prerogative rights which had already vested."

We find chapter 10 a consolidation of several Acts. The greater portion of it, however, is found in 32 Vic. ch. 21, (O.) where nearly all the penalty clauses are found, with the exception of sections 152, 153, and 181, above referred to, sections 152-3 being taken from 39 Vic. ch. 10, and 181, from 37 Vic. ch. 2. Referring to 32 Vic. ch. 21, we find section 4 of ch. 10 R. S. O., substantially the same as section 2 of this Act. We note that no section of this Act provides for the recovery of any penalty except the general provision in section 77, which is consolidated in chapter 10 R. S. O., as section 182.

We further find section 2 taken from chapter 6 of the Consol. Stats. C., section 1. By sub-section 2 of section 1 of chapter 6, Consol. Stat. Can., we find that the sum of \$2,000 is to be "recovered by such person as shall sue for the same," &c. This chapter 6 has also a section, No. 87, providing for the recovery of penalties, with full costs of suit, by any person who will sue for the same, &c. Section 1, it will be observed, contains no provision as to "costs of suit." We find section 1 consolidated from 20 Vic. ch. 22, sec. 2, and section 87 from 12 Vic. ch. 27, sec. 64.

Turning to ch. 22 of 20 Vic. we find that there are only two sections providing for penalties or forfeitures, viz: sections 2 and 5, each of which declares a forfeiture of \$2,000, and provides for its recovery. There is no other section providing for recovery of penalties or forfeitures. Again, looking at 12 Vic. ch. 27, we find very many sections declaring offences and affixing the penalty, but only

one providing for the recovery, viz: section 55; while in section 64 is a general clause providing for the recovery of all penalties under the Act. The history thus clearly shows how it is that chapter 10, R. S. O., is framed.

Section 2 was originally enacted with a provision for recovery of the penalty, no general clause being in 20 Vic. ch. 22; but when 32 Vic. ch. 21 (O.) was passed, it was found unnecessary to continue this provision, as a general clause was enacted. The revision when the consolidation took place by 32 Vic. ch. 21, was more careful than either in Consol. Stats. C., or R. S. O., for in Consol. Stats. C. the general section 87 was brought down from 12 Vic., and section 2 from 20 Vic. without comparing the verbiage, and in R. S. O. sections 152 and 153 were brought from 39 Vic., and section 181 from 37 Vic., without comparing them with the other sections of the Act into which they were thus introduced.

It seems, therefore, clear beyond reasonable doubt,

1. That forfeitures and penalties belong to the Crown unless otherwise provided for, and therefore no argument can be founded on the use of the word "forfeit" as indicating a forfeiture to the Crown as distinguished from a penalty.

2. That the words "forfeiture" and "penalty" have been used as synonyms for a long number of years in many standard legal works, and by many learned men.

3. That the thing forfeited is sometimes called a penalty.

4. That the provisions of section 4 ch. 10, R. S. O., as originally enacted, gave any person who might sue for the same the right to recover the amount forfeited, and that such provision was dropped from the clause when it was introduced into 32 Vic. ch. 21, where it was no longer necessary, a general clause making a similar provision.

I am, therefore, of the opinion that the defendant has failed to sustain his ground of demurrer, and that it must be overruled, with costs.

Leave to plead granted on payment of costs within fifteen days.

Judgment for plaintiff on demurrer.

[QUEEN'S BENCH DIVISION.]

REGINA V. SMITH.

*By-law for weighing and measuring wood—Delivery in specified waggons—
Ultra vires.*

The municipal council of the city of Hamilton passed a by-law that no person should, upon or after sale thereof, deliver any stove wood in or from any waggon &c., otherwise than in or from a waggon of a certain capacity, the sides of which should be constructed of slats of a certain width and a certain distance apart from each other. The defendant was convicted of a breach of the by-law.
Held, that the by-law was *ultra vires*, for though the council had the right under the Municipal Act, R. S. O. ch. 174, sec 466, to provide for the weighing or measuring of wood, they had no power to enforce delivery, upon or after sale, in a particular kind of waggon.

Feb. 1, 1884. *Clement* moved to quash the conviction in this case.

The defendant, on the 28th Dec., 1883, was convicted by the Police Magistrate of the city of Hamilton, for that, on the 12th of December he did, upon the sale by him, as a wood-dealer in said city, of cordwood which had been cut up into shorter length for use as fuel, and was commonly known as stove wood, unlawfully use for the measurement and delivery thereof a waggon, the sides of which were not constructed of slats of five inches wide and one-and-a-half inches apart, and deliver such wood to the purchaser thereof from the waggon aforesaid, contrary to a certain by-law, &c., passed 25th September, 1876, entitled "A by-law to regulate the manner of selling stove wood in the city of Hamilton," and a by-law, passed 24th Sept., 1883, entitled, "By-law 238," to amend by-law 104, entitled, "A by-law to regulate the manner of selling stove wood in said city, and for the appointment of wood inspectors," and a by-law, passed 26th Nov., 1883, entitled, "By-law No. 244," to amend by-law 238 on wood, and a by-law, passed 12th of May, 1873, entitled, "By-law No. 1."

The first of these by-laws enacted that no person should upon or after sale thereof, deliver any stove wood in, on,

or from any waggon, sleigh, or other vehicle otherwise than in or from a waggon or sleigh box of the capacity of 84 cubic feet, or a waggon or sleigh box of the capacity of 42 cubic feet, and having therein, in a conspicuous place, on each side thereof, the name of the owner and the number of the box, followed by the words, "half cord box," or "quarter cord box," as the case might be.

The second section provided that no such box should be used for the delivery of stove wood until inspected and measured by the wood inspector, &c.

The by-law recited that there was no convenient method by which stove wood could be sold and delivered to customers by accurate cubic measure, and that some standard should be adopted for measurement thereof, and the sale and delivery regulated so as to secure uniformity and prevent injustice; and it had been found by measurement that a half cord for 64 cubic feet of ordinary cord wood cut up for use as stove wood, and thrown into a box, would occupy a space of 84 cubic feet; and that a box containing a larger quantity could not be conveniently used for delivery to customers.

Section 12 described what stove wood was, and that the words, "sold and delivered," and "sale," or "delivery," were intended to mean sold and delivered in Hamilton, and in the ordinary course of the trade or business of selling such stove wood for use as fuel, and not to prevent parties from buying, selling, or delivering stove wood in any other mode expressly agreed on.

An amending by-law (No. 238) added to the first section above referred to thus: "and the sides and bottoms of such boxes shall be constructed of slats, each five inches in width, running from front to rear of such boxes, such slats to be set two inches apart from one another."

Another amendment was made by by-law No. 244, passed a month before this conviction, by striking out the words, "and bottoms," and striking out the word "two," and inserting in lieu thereof the words "one and a half," and add in the words, "and that the first of such space

shall commence at the surface of the bottom of said box." The last by-law mentioned in the conviction only referred to penalties.

The defendant was a wood dealer in Hamilton, and the evidence was clear that the slats in his waggon, or box, in which he delivered the said stove wood, were not five inches wide and one and a half inches apart, as prescribed by the by-laws.

Defendant admitted this, and gave evidence that he delivered kindling wood, coal, and saw dust from the same boxes, which boxes had been inspected and stamped by the wood inspector: that he objected to the requirements of the by-law, because he would have to keep two sets of boxes for his business in delivering coal, wood, and saw dust, and that he believed it impossible to make the sides of the box strong enough to hold wood when thrown in as usually done, and the slats would bulge out and be unserviceable, &c.: that the wood was never put in the boxes and exposed for sale, but it was always ordered before being put in the boxes. He called a carpenter to prove that to construct the sides of slats as required would make them very cumbersome to be strong enough to be used by wood dealers: that they ought to be supported by the sides, and even then would bulge out.

MacKelcan, Q. C., shewed cause.

Clement, contra.

Feb. 4, 1884. HAGARTY, C. J.—The Municipal Act, R. S. O. ch. 174, sec. 466, allows the passing of by-laws under the head of Markets, &c., thus, sub-sec. 6:

"For regulating the place and manner of selling and weighing grain, meat, vegetables, fish, hay, straw, fodder, wood, lumber, shingles, farm produce of every description, small ware and all other articles exposed for sale, and the fees to be paid therefor," &c.

Sub-sec. 9: "For regulating the mode of measuring or weighing (as the case may be) of lime, shingles, laths, cord wood, coal, and other fuel."

Sub-sec. 11: "For regulating all vehicles, vessels, and all other things in which any thing is exposed for sale or marketed, and for imposing a reasonable duty thereon and establishing the mode in which it shall be paid."

The by-law may regulate the place and manner of selling and weighing cord wood.

2. May regulate the mode of measuring or weighing cord wood, coal, or other fuel.

The question seems narrowed down to this: Can they forbid any person, upon sale of this stove wood, from delivering it to the purchaser in or from any waggon, sleigh or vehicle, except from a waggon or sleigh box of one or other of two named capacities, viz., 84 or 42 cubic feet, prescribing how the sides and bottoms must be made, &c. &c. The box is to be marked half cord, quarter cord respectively.

Or, in other words, can the municipality compel dealers to use vehicles for delivery of the wood they sell, except made of a prescribed size, capacity, and form of construction?

I do not propose to discuss any wider question than that distinctly raised by the conviction in this case.

We need not raise any question as to the power of the council to regulate the place and manner of selling and weighing, the wood when exposed for sale, and the fees to be paid therefor.

They may appoint where it is to be sold, and the manner in which it is to be weighed, to charge fees therefor.

It is to be noted that the word used in the sub-section 6 is *weighing* not measuring,

Sub-sec. 9 allows them to regulate the mode of measuring, or weighing, (as the case may be,) certain of the articles mentioned in sub-sec. 6. We may assume therefore that they may provide for the ascertaining of the true quantity sold by some process of weighing or measuring.

Having done this can they do more, in the way of directing every delivery to the purchaser, whether living near or far, in any vehicle except one of a prescribed size and kind?

I am not concerned to discuss whether the by-law is wise, or unwise, whether it may or may not be the best way to ascertain measurement for the protection of customers.

Viewed in any light it involves a very formidable exercise of power, and if legal would enable a similar rule to be applied to the large interests in the trade in coal, cordwood, lime, shingles, laths, particularly mentioned in sub-sec. 9, if it might not also be extended to the largest interests in the country, as to the grain trade, &c., under sub-sec. 6.

In interpreting an enactment of the Legislature we may have to consider the extent to which a particular construction of it may be pushed.

This defendant is convicted for this, that having sold some cordwood he did unlawfully use for the measurement and delivery thereof a waggon not constructed as the by-laws provide, and did deliver it to the purchaser therefrom. This is the offence charged.

With the strongest desire to uphold all regulations reasonably made by the municipalities, I am unable to see how this conviction can be supported.

For the purposes of the case I concede their right to provide for the weighing or measuring of the wood sold by defendant, but when he has sold it I do not see how they can force carriage and delivery in a specially sized and constructed vehicle, to be provided by the vendor as a means of ascertaining the weight or measurement.

It is not necessary here to decide that they could lawfully compel a vendor to provide a box of named dimensions at his wood yard, where all wood sold by him could be measured. That would be, in effect, making him provide the means of measurement; but such a course would fall far short of compelling all deliveries in the city to be made in prescribed vehicles.

If it can be done with stove wood, it can without question be done with coal.

Section 12 of the by-law exempts from its operation the cases where by express agreement the selling and delivering may be in any other mode.

This conviction is absolute for the user of a vehicle other than that directed, without negating any express agreement to the contrary, and the evidence is wholly silent as to whether any such agreement existed or did not exist.

This point, however, was not taken by the applicant, nor does the conviction or the evidence shew what quantity was being carried for delivery in defendant's waggon, or whether a lesser quantity than the quarter cord was being carried.

I cannot clearly see from the by-laws what provision is made for the sale or delivery of a less quantity than a quarter of a cord, or how it is to be delivered if carried at all by the vendor; but I have only to deal with the subject matter of the conviction.

I feel compelled to hold that it cannot be supported, and must be quashed.

It is hardly necessary to discuss sub-sec. 11, as it is clear this conviction is not affected by its words. The vehicle here used was not one in which the goods were exposed for sale or marketed.

Conviction quashed.

[COMMON PLEAS DIVISION.]

PATTERSON ET AL. V. MCKELLAR, SHERIFF.

*sa. goods—Delivery to sheriff—Sale by execution debtor thereafter—
Right of sheriff to goods—Abandonment.*

THE sheriff received two executions against one M.'s goods, on the 18th January, and 15th February, respectively. He made a formal seizure on the delivery of the first writ, but left no one in possession, and the execution debtor remained in possession, and carried on his business before the seizure. There had been a stay on this writ by the creditor for the execution creditor, but on the delivery of the second writ the sheriff was directed to proceed on both. On the 6th March, goods, consisting of the whole of the execution debtor's stock in trade, were sold by the execution debtor to the plaintiffs, who removed them to their own place of business. On 22nd March, the sheriff seized all the goods then in the plaintiffs' possession, which he received from the execution debtor, as also certain goods of the plaintiffs which he claimed to take in lien of goods received from the execution debtor and sold by plaintiffs. The sale to the plaintiffs was said to be *bona fide*, and for value, and without notice of the executions. In replevin for the goods, WILSON, C. J., dissenting, that the sheriff was entitled to the goods the execution debtor then in plaintiffs' possession; but not to the goods taken by the sheriff in lien of those sold by the plaintiffs: that there was no abandonment of the executions, nor any such conduct on the part of the sheriff or the execution creditor as to estop them from asserting that the executions were in force. On the sheriff making his seizure on the 22nd March, the plaintiff gave him an undertaking to answer for all goods sold by him thereafter, if the sheriff should be held entitled to the goods. The sheriff, under a counter-claim setting up this undertaking the sheriff was entitled to recover the value of the goods sold by the plaintiffs after the 22nd March, and before the issue of the writ of replevin.

THIS was an action of replevin brought against the defendant the sheriff of the county of Wentworth, who had seized and taken certain lumber out of the possession of the plaintiffs, under two writs of execution against the goods and chattels of one T. T. Milne, in two suits of *Hatton Milne*. The first writ issued on January 18th, 1882, and the second on 15th February, 1882.

The plaintiffs claimed title under a sale of the lumber made to them by the said Milne on March 7th, 1882.

The cause was tried before Patterson, J. A., without a jury, at Hamilton, at the Fall Assizes of 1882.

The facts are fully stated in the following judgment of the learned Judge at the trial.

PATTERSON, J. A.—The plaintiffs, who are dealers in lumber in Hamilton, replevied from the defendant, who is sheriff of the county of Wentworth, 51,300 feet of lumber which the defendant's deputy had seized in the plaintiff's lumber yard and removed.

The statement of the plaintiffs' claim is equivalent to the former declaration in replevin.

The defendant, in his statement of defence, justifies the seizure under a *fi. fa.* against one Milne at the suit of J. S. Hatton, delivered for execution on 18th January 1882, under which he alleges he seized on 19th January 1882. He goes on to aver that the goods were, at the time of the seizure, the property of Milne, and exigible for the satisfaction of the judgment, and that they were lawfully seized under the *fi. fa.* He further sets out that he, as sheriff lawfully might, delayed from time to time to sell the goods under the writ: that, while they were under seizure, they remained and were for a time in the lumber yard and premises of the plaintiffs, who undertook in writing to deliver them up to the defendant, as sheriff, upon demand: that the plaintiffs now pretend to claim title as purchasers from Milne, which title the defendant contests; and that, upon that claim being made, he demanded the goods under the writ and undertaking, and removed them from the plaintiffs' premises.

As a second branch of his defence, he alleges that the removal was with the leave and license of the plaintiffs and he further submits that replevin will not lie against him as sheriff in possession of goods seized in execution.

The defendant also, by way of counter-claim, alleges that the plaintiffs by their writing, while the *fi. fa.* was in full force and unsatisfied in the hands of the defendant for execution, promised and agreed for a valuable consideration to deliver up to the defendant the goods mentioned in the statement of claim, as and for the goods of Milne, or to account and pay over to him the value of them; and under that promise he claims the value of the goods.

I allowed an amendment of the counter-claim by setting up a second *fi. fa.*, issued by the same judgment creditor against Milne, and delivered to the sheriff on 15th February 1882; but I refused leave to justify the seizure under it.

The plaintiffs, in their reply, join issue upon the state-

ment of defence, and further allege that the defendant abandoned the seizure of the goods of Milne mentioned in the statement of defence, and allowed Milne to dispose of them as he saw fit; that, after the defendant had abandoned the seizure, and while he allowed Milne to sell the goods, the plaintiffs purchased from Milne a portion of the goods replevied, but the residue were never the property of Milne. Further, they say that the defendant sent his deputy and bailiffs to the plaintiffs' lumber yard with waggons and carts, and threatened and intended to remove all the plaintiffs' lumber unless the plaintiffs would pay the execution, though the defendant well knew that nearly all the lumber in the yard never belonged to Milne, and that such removal would stop the plaintiffs' business and cause them great loss; and by threats and duress, and in order to avoid such removal and loss, forced and compelled the plaintiffs against their will to sign the alleged agreement; and that forthwith, after signing the agreement, they repudiated it and gave the defendant notice of such repudiation. And it also states that there was no consideration for the agreement. Issue is joined by the defendant upon this reply.

There are not many facts to decide, but I have to find them from evidence which is conflicting upon several material points.

The plaintiff John Patterson, Milne the execution debtor, and Mr. Gault the manager of the Hamilton branch of the Merchants' Bank, give accounts of the purchase of the lumber by the plaintiffs, which are not in all particulars easily reconcilable; and the version given by the deputy sheriff of some transactions is directly opposed to the evidence of some other witnesses.

I may say that the defendant took no part, personally, in the proceedings which are in question, but was throughout represented by his deputy.

I have no reason to doubt that the plaintiffs bought the lumber in good faith, and I believe that they did so without any knowledge of its having been taken in execution or being subject to be taken in execution, or of there being any execution against Milne in the hands of the sheriff. I am of this opinion, notwithstanding the evidence given by a man named Robert Cruikshank, of which I may have to speak again. I believe also that they paid at maturity the note which they gave for the lumber without any collusive or dishonest understanding with the bank or its officers and that therefore, if they have now to submit to the loss

of the goods they paid for, an injustice will be done to them, even though they may on legal grounds be helped.

Milne was carrying on business as a dealer in lumber at Hamilton. Mr. Laidlaw, a solicitor practising in Hamilton, recovered judgment against him and one Davidson, for a debt due to one Hatton, and issued a *fi. fa.* and delivered it to the sheriff on 18th January, 1882.

Under that writ the deputy sheriff seized, in a mere formal manner, the lumber in Milne's yard and his horse and lumber waggon. He did not retain possession of anything seized, nor interfere with Milne carrying on his business and selling and delivering lumber as usual.

Milne applied to Mr. Laidlaw for time, and on 20th January Mr. Laidlaw wrote to the sheriff thus:

"*Hutton v. Milne.*—The defendant assures me that he is expecting to receive money on a contract in about two weeks, and I am willing that he shall be allowed this extension of time for payment of this execution, and that you shall not advertise his goods or press the execution in the meantime."

Mr. Gault, the bank manager, interested himself in some way in either procuring this extension of time or, at the least, in inducing the deputy sheriff not to take actual possession.

I am not quite clear as to the part taken, either at this time or afterwards, by Mr. Gault, and I do not think it essential to understand it thoroughly. I am more concerned with what was done by the sheriff; and it may be that that will appear to be shewn sufficiently by the deputy sheriff, at all events for the purpose of charging the sheriff, even though one might hesitate before giving full effect to all that he says, if the question was with the bank or a stranger. The deputy sheriff tells us that on the same day, 20th January, on which Milne brought him Mr. Laidlaw's letter, Milne and Gault came together to his office, and Mr. Gault then said he wished that Milne should not be put to costs, and that if the sheriff would not put a man in possession, he would be responsible for the safe custody of the goods, as he was raising money to pay off all Milne's liabilities. Mr. Laidlaw deposed that the deputy sheriff told him, sometime within the two weeks from 20th January, that Mr. Gault was raising money for Milne to pay off the execution; and that he, Laidlaw, knew from Mr. Gault that he was working in the interest of Milne to raise money. Mr. Gault also states that he went, respec-

ing the execution of 18th January, to the sheriff's office, and to Mr. Laidlaw's office, but he denies having undertaken to be responsible for the goods. He says there was a note of Milne's in his bank for \$500, which was secured by a chattel mortgage, and he does not admit any more extensive interest in Milne's affairs. The chattel mortgage is spoken of once or twice by other witnesses, but it is not in evidence, and I know nothing about it, neither date nor purport, beyond the casual references made to it. Milne, *q. g.*, says he gave up the lumber to Mr. Gault under the mortgage.

Milne's account of the stay given by Mr. Laidlaw is to the effect that Laidlaw wanted as security the claim of Milne upon some contracts; and that he supposed he had assigned the contracts and that the execution had been taken off altogether.

On 16th February, 1882, Mr. Laidlaw delivered to the sheriff another *fi. fa.* at the suit of Hatton against Milne, and at the same time he says he left a verbal message with a boy in the sheriff's office, that both writs must be returned without delay. The deputy sheriff says that, upon receiving the second writ, he levied on the household furniture and the lumber that was still there; but he did not place a man in possession. His levy was in fact merely formal, as the first had been. He explains this by telling us that Mr. Gault reiterated his assurances that both the executions would be paid, and that in the meantime he would be responsible for the forthcoming of the goods. To make assurance on this point doubly sure, he refers to his diary under date 16th February, 1882, where there is an entry made, as he says, at the time, to this effect: "Levied for second execution at defendant's dwelling house, and told him I must leave man. Drove to Laidlaw's with him, but could not see Laidlaw. Gault, the manager of the bank came to my office, and promised to find money to pay both executions and writ, and undertook to be responsible for safe custody of goods if man was not put in possession; said would have money in a few days as he was carrying his account. I agreed on Gault's personal undertaking to do so."

Milne says he does not remember the second seizure, and Gault says the whole story entered in the diary is a fabrication as far as it relates to him. He swears he was not at the office except on the one occasion: that he did not know of the second writ: that he was not carrying

Milne's account: and that he gave no such undertaking. The deputy sheriff is thus flatly contradicted by Gault, and he is not corroborated by Milne. In effect, Milne affirmatively contradicts him also when he says that he supposed the executions were taken off under his arrangement with Mr. Laidlaw in January, in which I understood him to refer to the debt for which the second execution was issued, as well as to that in the first execution, notwithstanding that only one of the judgments had been recovered in January.

It is a little difficult to believe that the rather elaborately worded entry was made in the diary at the date of the transaction while the officer who says he penned it did not take the safer course of getting a memorandum from Mr. Gault, or of executing his writs. The fact that the writs were not executed is, however, strongly suggestive of some understanding on the part of the deputy sheriff that he had either a guarantee which he could enforce, or a prospect on which he could rely of getting the money. To that extent his story may be said not to be destitute of corroboration; but, as between the parties to this suit, I must accept it as true. It is consistent with the state of facts as understood by the plaintiffs when they bought the goods, and the defendant, who now puts it forward as the truth, cannot complain of its being accepted as the truth. I refer to the facts stated in the diary, which facts may well be true as there stated, whether the entry was made when it purports to have been made or at a later date. I express no belief one way or other upon those facts, which, for anything I can anticipate, may become the subject of litigation outside of the present action. I merely decide to accept, as against the present defendant, the account given by his deputy.

The date to which we now pass on is Saturday, 4th March. Up to that time Milne had not been interfered with in his business. We are not told that he added to his stock, but it is in evidence that the sales and deliveries of lumber from his yard proceeded in their ordinary course. On the evening of 4th March negotiations were begun for the purchase by the plaintiffs of Milne's stock of lumber, and they were concluded and the purchase effected on Monday the 6th. The sale was made by Milne or Gault, or by Milne and Gault, for there is a curious discrepancy among the three persons who speak of it. It is certain that Gault took an active part in it, and I believe he had

to do with it as Milne. John Patterson says he met Milne, but saw Mr. Gault in connection with the purchase. He says he agreed with Milne to give a promissory note, Milne telling him that if he did not find it to hand it to Mr. Gault. Patterson accordingly made the note, which was for \$500.65, and failing to find Milne absconded that day, he handed it to Mr. Gault. The note was payable to the order of Milne. Mr. Gault procured the indorsement of it by Milne's wife, ostensibly as attorney for her husband, but afterwards returned it to Patterson and got him to make another in its place, payable to the order of Patterson and brother, and indorsed by them at the Merchants' Bank. The note was at three months' date, dated 7th March and was paid at maturity.

Mr. Gault disclaims any share in making the sale. He says Milne sold the goods; while Milne's story is that it was all Gault's doing. He says he let Gault have the lumber on the Saturday on his mortgage, and that Gault took it to Patterson. He denies making any arrangement to give a note, and even denies any knowledge of a note having been given. He goes into some detail, saying, amongst other things, that Gault had been angry because he would not let him have the lumber, and that he went to Gault's house to tell him he might have it.

Mr. Gault has already said that he believes the sale was made without any knowledge on the part of Patterson that there was an execution in the sheriff's hands against Milne. The only evidence to the contrary was that given by Mr. Cruikshank, who speaks of something which he told John Patterson a few days after Milne gave the mortgage to the Merchants Bank, and long before the lumber was moved. It was as he says long, long before Mr. Gault went away. He told John Patterson, he informs us, not to touch the lumber; that the sheriff had possession of it. He says it was at his instance that Milne gave the lumber on mortgage; and that on the same afternoon, and before the mortgage was signed, the deputy sheriff came as a witness and told him he had possession. He further stated that Patterson mentioned to him that Milne was unable, and that he was going to buy the lumber, and he then told Patterson not to touch it.

Patterson denies that what Cruikshank swears to ever took place. He says Cruikshank did tell him that the bank had a chattel mortgage on the lumber, but that was after the plaintiffs had purchased it; and that he never told him of it under seizure.

As between Patterson and Cruikshank, I accept without any hesitation the account given by the former. What is said by Cruikshank is too widely at variance with what every one else tells us to deserve much attention. The project of selling to the plaintiffs, or the plaintiffs' idea of buying, had not arisen, "long, long before Milne went away," but only about two days before that event; and, if the deputy sheriff took the trouble of telling Cruikshank that he had possession of the goods, he told him what was not true. The witness's reference to the date of the conversation is not made more certain by his allusion to the chattel mortgage, because we do not know when that rather mythical instrument was executed.

The lumber was removed by the plaintiffs on the 6th and 7th of March. Some was taken to their mill on Mary street, where it was distributed according to its quality, not being kept separate from the other lumber which the plaintiffs had or afterwards brought to the yard, but dealt with and disposed of as part of their ordinary stock.

So things went on until 22nd March, when Mr. Laidlaw wrote to the sheriff, as follows:

"*Hatton v. Milne*.—The plaintiff informs me that the lumber seized in this cause, and which is properly available for the payment of the executions in your hands, has been removed to the lumber yard of Patterson Bros., and we think you should immediately place a man in possession, and realize the lumber."

On receiving this letter the deputy sheriff went to the plaintiffs' yard, taking with him a bailiff named William M. Smith. What took place there is of importance and like too many of the facts in the case, is the subject of conflicting evidence. The deputy sheriff says he then informed John Patterson that he had two executions against Milne, and that, after some talk about the lumber, Patterson agreed to give an undertaking for its production if it was not then removed, whereupon the deputy sheriff drew up a memorandum which Patterson signed. This the substance of the account given by the deputy sheriff. Patterson's story is somewhat different. He says that the deputy sheriff threatened to put a man in possession once if he did not pay the value of the lumber that he wanted to see if the sheriff had a right to it. In this part of the evidence from my own note of it:—

said that was all he wanted, and if I would give an undertaking to give up the lumber if the sheriff had a right to it that was all he wanted. I suppose I could have read the writing, but he was in a hurry and I did not read it. He said he would leave a bailiff in possession if I did not sign the undertaking. I told him I claimed the lumber. He said Milne had no right to sell it, that he had seized it on 20th February; I told him I had settled for it."

The bailiff Smith corroborates Patterson with reference to the undertaking in one particular which has an important bearing upon the effect of the document, when he states, as he did in the course of his cross-examination, that what Patterson said was, that, if the lumber was liable to those executions, the plaintiffs would be responsible.

The instrument is in these words:

"Hamilton, 22nd March, 1882. We hereby undertake to deliver up to the sheriff of the county of Wentworth or account to him for the lumber removed by us from the premises of T. T. Milne, builder, city. Given under our hand.
"PATTERSON BROS."

This was signed under the circumstances shewn by the evidence of Patterson, Smith and deputy sheriff, and on the occasion at which Patterson for the first time, so far as I gather from the evidence, became aware of the existence of the *fi. fur.*

As soon as he had got rid of the officers, Patterson went to Mr. Gault and told him what had happened. At his suggestion he consulted Mr. Martin, a solicitor, who advised him to get back the undertaking and let the sheriff seize in the ordinary way. Patterson accordingly went to the sheriff's office and asked for the paper. What thereupon happened is, like so many other of the incidents, told in different ways. Patterson simply tells us that the deputy sheriff consulted his solicitor and then refused to give up the paper. The deputy sheriff says that Patterson explained the matter to the sheriff's solicitor and left the office fully satisfied the goods should remain.

I am satisfied that there was no assent by the plaintiffs to the retention of the memorandum after the demand made for it under Mr. Martin's advice, and no acquiescence in the claim asserted by the deputy sheriff to the goods. I do not attach much importance to the demand of the document beyond its significance as a prompt repudiation of any agreement, and a distinct notice to the sheriff not

to forbear to take any action he might think necessary in reliance on the plaintiffs' acquiescence.

It is not necessary to refer in detail to what took place during the week following, in the way of correspondence between the solicitors, attempts to have interpleader proceedings instituted, &c., as those matters do not touch the present controversy. The result was that on 29th March the deputy sheriff broke into the plaintiffs' yard and removed the lumber, which was afterwards replevied. One matter only relating to the seizure requires mention. The deputy sheriff states that after he had been refused admittance, and had broken into the yard, the plaintiff, Thomas Patterson, aided him by pointing out certain piles of lumber which had not been got from Milne; and that those piles were left, and only the others, or what Thomas Patterson indicated as the Milne lumber, taken. This is given as evidence of the identity of the lumber taken, and also as supporting the defence of leave and license. Thomas Patterson swears that he refused point blank to point any lumber out, and warned the teamsters that they would remove the lumber at their peril. A bailiff called Littlehales was with the deputy sheriff. He was not called as a witness. I do not rely on the version of this transaction given by the deputy sheriff.

Upon the state of facts thus described, I am of opinion that the plaintiffs are entitled to judgment.

The main contention on which the defendant relies is that the goods were bound by the writs of *fi. fa.*, and that therefore he had right to seize them as he did. Upon this topic I have been referred to a number of authorities. I do not find among them any case precisely on all four points with this one; but I find doctrines laid down which seem to be sufficient to justify in law the decision which I take to be called for by justice as between the plaintiffs and defendant.

The facts on which I found my opinion are that the sheriff, having the *fi. fa.* in his hands, and after a warning from the solicitor who issued it that he required it executed and returned, left Milne, the execution debtor, in uncontrolled possession of the goods, permitting him openly and in the ordinary manner to sell and use them in the way of his trade; and that he did this in reliance upon the undertaking of Mr. Gault to see the debt paid or to be responsible for the goods. Thereupon the plaintiffs in good faith buy the goods either directly or indirectly.

from Gault, or buy from Milne and Gault together. I do not think it matters whether the purchase was from Milne by Gault's intervention, or from Gault by Milne's intervention, which would be the shape of it if, as Milne states, he had given the goods to Gault under the chattel mortgage. In either case Gault got the money for the bank, whose manager he was. The price paid was a fair price, probably more than the sheriff could have realized if he had sold. The matter then stood thus:—The plaintiffs had the goods, and had paid for them. Mr. Gault had received the price, and the sheriff had Mr. Gault's undertaking to pay over the money, or to pay the judgment debt. What had happened was the natural result of the conduct of the sheriff. He was not prejudiced, if his evidence is true that he had Mr. Gault's undertaking. And a fraud will have been committed upon the plaintiffs if, after having paid for the goods, they have to lose them or pay for them a second time. To that fraud the sheriff, through his deputy, will have been a direct party if he intended that Milne or Gault should sell the goods, or if he left them in Milne's possession with the contemplation, even if he did not actually intend, that they might be sold as they were; and if not chargeable as a *particeps fraudis*, he will at least, by his conduct, have enabled the others to commit the fraud.

The situation is that which is put by Draper, C. J., in *Carruthers v. Reynolds*, 12 C. P. 596, at p. 599: "If he had removed it when he made the purchase," the Chief Justice said, speaking of a chattel which Carruthers had bought from a judgment debtor who had been allowed by the sheriff to keep open his shop and continue his business, but which chattel, though Carruthers had paid for it, he had allowed to remain on the debtor's premises, "I am at present of opinion that the sheriff could not have followed and seized it on the strength of the execution in favour of Grasett, for the sheriff's own conduct put it into the power of the execution debtor to commit a fraud, or it amounted to a licence to him to sell any of his goods, trusting that he would pay over the proceeds to the sheriff, and constituting him a *quasi agent* of the sheriff to sell."

The case of *McIntyre v. Stata*, 4 C. P. 248, and the decisions referred to in that case and in *Castle v. Ruttan*, reported at p. 252 of the same volume, may also be referred to in support of the plaintiffs' position.

I hold, therefore, that the property in the goods passed to the plaintiffs as against the defendant.

It was objected that replevin would not lie against sheriff for goods seized under execution. I do not require to consider this objection at any length. The sheriff here seized goods which he was not authorized to seize under the *fi. fa.*, because they were at the time of seizure the property of the plaintiffs, and were not subject to seizure by the defendant. Under those circumstances, it is, I think, clear, that the owner may replevy from the sheriff. The case comes distinctly within the terms of the Act respecting Replevin, R. S. O. ch. 53; and the above judgment given by Mr. Justice Gwynne in *Jameson Kerr*, 8 U. C. L. J. 240, 6 P. R. 3, makes it unnecessary for me to discuss the subject further.

The defendant has, however, set up by way of counterclaim a demand for the value of the lumber seized by him and replevied by him, under the document signed by the plaintiffs on 22nd March, 1882.

I think any such claim is entirely out of the question. The circumstances under which the document was obtained and the retention of it after the prompt repudiation of it by the plaintiffs, would make it inequitable to enforce it. But, setting aside these considerations, the defendant must fail on other grounds. There is no consideration expressed for the promise to deliver up the goods. We have therefore to look elsewhere for evidence of the consideration and we find from the testimony of the bailiff Smith corroborating that of the plaintiff John Patterson, that the consideration was not only the forbearance to remove the goods, as the deputy sheriff seemed to say, but it was that the goods should appear to be liable to seizure in the hands of the plaintiffs, under the writs of execution. I am inclined to think that without the express evidence of the ingredient of the consideration, the same thing would necessarily have been implied from the circumstances. The memorandum itself makes no allusion to the execution. The bare agreement to hand over goods to the sheriff, which is all that is expressed, would go no farther towards supporting an action than a naked promise to hand over goods to any one else. The existence of the executions has to be proved by parol, and when we learn that it was for the purpose of those writs that the sheriff was to have the goods, it follows, even without the direct evidence on this point, that the right to take the goods under the writs is at the bottom of the agreement.

The plaintiffs are entitled to damages, which are

necessarily confined to the price of the replevin bond, but which ought to include all the damages sustained by the wrongful seizure. No specific evidence of the amount of damage has been given, although from the fact that the goods were removed from the premises, it is evident that damage to some extent must have been sustained.

In the absence of definite information I shall assess the damages at twenty dollars, and give judgment for the plaintiff for that sum.

I dismiss the counter-claim; and I adjudge the defendant to pay the plaintiffs their full costs of suit.

In Michaelmas sittings of the Divisional Court *Oser* Q. C., moved on notice to set aside the judgment of the plaintiffs and to enter a judgment for the defendant.

During Easter sittings, *Oser*, Q. C., supported the *plaintiffs'* claim to hold the lumber under the alleged sale from Milne. The learned Judge held in effect that the sheriff dealt so negligently with the goods as to enable Milne to dispose of them; and he likens the case to that of a shopkeeper who sells goods in the ordinary course of business. This is not such a case, but instead was a sale out of the ordinary course of business, namely, the whole of his stock-in-trade. There never was a sale by Milne to the plaintiffs. The evidence shews that the whole transaction was a device of the Merchants Bank, to enable them to secure for themselves the goods in question. At the time the sale is said to have been made Milne had left the country. The bank got the plaintiffs to give their note and as Milne was away they get the wife to endorse it as his agent; and then on Milne's return subsequently a new note is given and endorsed by him. After the seizure the goods are in the custody of the law. It is not essential that the sheriff should keep a man in possession of the goods. The goods continue bound by the writ, and the sheriff can follow them even in the hands of a purchaser for value. The purchaser takes them subject to the execution. There never was an abandonment; but in any event the written acknowledgment estops the plaintiffs from saying that there was an abandonment,

and they had in consequence a title. The defendant under his counter-claim is entitled to recover the goods sold by the plaintiffs, after the date of their undertaking, and before the issue of the writ of replevin. He referred to *Hinck v. Sowerby*, 4 App. R. 113; *McIntyre v. Stata*, 4 C. P. 248; *Rowe v. Jarvis*, 13 C. P. 495; *Hall v. Goslee*, 15 C. P. 101; *Foster v. Smith*, 13 U. C. R. 243; *Tuer v. Harrison*, 14 C. P. 449; *Walton v. Jarvis*, 14 U. C. R. 640; *Churchill Law of Sheiff*, 2nd ed., p. 209, 210; *Gladstone v. Padwic* L. R. 6 Ex. 203.

E. Martin, Q. C. We have nothing to do here with the bank. The whole question is whether there was a *bona fide* sale to the plaintiff. As to some of the goods taken by the sheriff, we are entitled to succeed, because these were the goods of the plaintiffs, and not of Milne, the judgment debtor. There was clearly a sale to the plaintiffs. The plaintiffs swear there was, and Milne's evidence is to the same effect. There is no evidence to shew that Milne had left the country when the sale was made, but the evidence would shew to the contrary and as his business required him to be away from his yard attending to the buildings he was erecting, he directed the note to be left at the Merchants Bank, and that his wife should endorse for him. The defendant does not attempt to set up that the wife had no authority to endorse. Then as to the right of the sheriff to follow the goods. When a sheriff seizes goods he must leave a man in possession, or must take precautions to protect the goods for the execution creditors. In this case the sheriff, after making the seizure, allows the judgment debtor to remain in possession as the owner, and in such a position that he can dispose of the goods. The sheriff must be treated either as abandoning the seizure, or else that he constituted the judgment debtor his agent to dispose of goods, relying on the judgment debtor to pay over purchase money. It was shewn that it was not in the interest of the judgment creditors to close up Milne's business, and to sell him out, and therefore they permitted

to continue the business, and cannot now set up that **Milne** could not convey a good title to the plaintiff. He referred to *Tucker v. Ross*, 19 U. C. R. 295; *Gilmour v. Buck*, 24 C.P. 187.

December 24, 1884. WILSON, C. J.—The decision of this case turns chiefly upon the question whether the plaintiff has a good title to the goods in dispute under the following circumstances—in stating them I pass over some matters unnecessary for the determination of the question:

The defendant, the sheriff of Wentworth, received two executions against the goods of one Milne a lumber dealer, one on the 18th of January, 1882, and the other on the 15th of February following. There had been a stay upon the first writ by the solicitor for the execution plaintiff, but which stay was withdrawn on the delivery to the sheriff of the second writ, and he was directed to proceed upon both of them. The sheriff did not seize the lumber after that, nor did he put any one in charge of it, because, as the deputy said, who was the officer who alone acted in these matters, "I had Mr. Gault the bank manager's undertaking as to the safe custody of the goods, and the lumber was all right in the yard on the 15th of February. * * Mr. Gault, after the second seizure, reiterated to me that in the course of a few days the executions would be paid, and both the lumber and the household goods would be safe, and on the strength of that I let the matter rest."

The debtor Milne was all the time from the delivery of the first writ until he sold the lumber to the plaintiff, left in undisturbed possession of all his goods, and he carried on his business during that time just as he had done before the delivery of the writs to the sheriff, and as if there had been no such writs in existence.

Upon the 6th of March the execution debtor and the bank manager together, the bank so represented by the manager being creditors of Milne the execution debtor, sold the lumber to the present plaintiff, who moved it to his own lumber yard upon that and the following day.

The deputy sheriff, on the 22nd of March, made a seizure of the lumber in the plaintiffs' yard, which he claimed to have been bought from Milne as before stated, and after some negotiations between the solicitors for the sheriff and the plaintiffs, and no settlement being made, the sheriff removed the lumber from the plaintiffs' yard, and sold it under the executions.

The plaintiffs say their purchase from the execution debtor of the lumber which the sheriff had seized and abandoned, and during the continuance of the abandonment, and which the debtor was allowed during that time to deal with as his own, gave them a good title to the lumber as against the executions, and as against the sheriff, the present defendant.

The defendant says, although he had abandoned possession of the lumber, and although the plaintiffs bought it from the execution debtor after and during the continuance of the abandonment, and for value, and without notice of the execution, that such purchase was subject to the executions, which were then in force and continued to bind the lumber, notwithstanding the abandonment of possession by the sheriff.

There are some propositions with respect to the operation of executions against goods, and the action of the sheriff under them, which will not be disputed : (1) That the execution binds the goods from the time of delivery of the writ to the sheriff to be executed. (2) That the goods of the debtor continue so bound during the continuance of the writ, although a seizure of them be not made by the sheriff. (3) That the sheriff should promptly execute the writ by seizure, and by maintaining possession of the goods seized. (4) That until seizure the goods are not in the custody of the law, but are merely bound by the execution. (5) That the abandonment of possession by the sheriff takes the goods from out of the custody of the law, "and leaves them bound only by the execution." (6) While the goods are only bound by the execution, that is before seizure, or after the seizure is given up, a distress or a seizure by the

bailiff of a Division Court will take precedence of the execution. (7) If the writ be delivered to the sheriff not to be executed, or not until a later day, or not until orders are given, it is not, while it is not to be acted upon, a writ to be executed. (8) While the writ is so stayed, the debtor may sell his goods, freed from the execution; that is, a good title will be acquired by the purchaser as against the execution creditor. (9) Even when the goods are under seizure the debtor may sell his goods, but the purchaser in such case takes them subject to the execution.

Is there any case in which the purchaser can acquire a good title as against the sheriff while holding an execution against the goods?

The execution, as stated, binds the goods of the debtor from and by the mere act of the delivery of it to the sheriff to be executed, and it binds also all persons claiming from or under the debtor, such as purchasers are. The plaintiffs became purchasers from the debtor while the sheriff held an execution against the goods of the debtor. Why then should the sheriff be liable to the purchasers for taking the goods from them which they had bought from the debtor? The plaintiffs say, because the sheriff, although he did seize the goods of the debtor, did not keep them, but abandoned possession of them, and allowed the debtor to continue in the control of them and to deal with them just as he had dealt with them before the sheriff received the writ, and he did so on a promise by the manager of the Merchants' Bank at Hamilton that the manager "would be responsible for the goods and pay the debt," and the plaintiffs bought the goods from the debtor while matters were in that state.

The deputy sheriff also said, "I had means of keeping track of the goods. I lived within a stone throw of the lumber yard where the lumber was, and was passing it every day."

The sheriff did not interfere with the goods in any way from the 15th of February until the 22nd of March, when he took them from the plaintiffs; the plaintiffs' purchase

being on the 6th of March, and being, as I infer from the evidence, a *bond fide* purchase and for value.

There was not in this case a mere abandonment only, but evidence of an entire abandonment by the sheriff, because he trusted to the bank manager being responsible for the goods and paying the execution.

In the case of *Carruthers v. Reynolds*, 12 C. P. 596, the sheriff received an execution against a carriage maker in March upon which he did not seize until June. The debtor carried on his business as usual with the knowledge and consent of the sheriff. On the 31st of May the debtor sold a carriage to the plaintiff, who paid for it; but he left it in possession of the carriage maker, and the sheriff seized and sold it. The plaintiff then brought his action against the sheriff, but failed because there had been no change of possession of the carriage from that of the debtor, nor a bill of sale of it registered.

The Chief Justice said, at p. 599: "If he," the plaintiff, "had removed it" the carriage "when he made the purchase, I am at present of opinion the sheriff could not have followed and seized it on the strength of the execution * * for the sheriff's own conduct put it into the power of the execution debtor to commit a fraud, or it amounted to a license to him to sell any of his goods, trusting that he would pay over the proceeds to the sheriff, and constituting him a *quasi* agent of the sheriff to sell."

There are many cases in which the sheriff may act to the prejudice of the creditor and bind him, as if he returned "goods on hand" or "money made" the creditor cannot issue another execution because these returns are false. Or if the sheriff seize goods of the debtor sufficient to pay the execution, the debtor is discharged although he did not sell or although he waste or misapply them: *Arch. Pr.* 12th ed., p. 629 630; 2 *Wms. Saund.* 344; *Slie v. Finch*, 2 Roll. 57; *Clerk v. Withers*, 6 Mod. 290; *Taylor v. Baker*, 2 Mod. 214.

So if the sheriff have two executions and sell the debtor's goods under and pay the second writ, the first

cution creditor cannot afterwards lawfully seize these same goods under his execution; his remedy must be against the sheriff: *Smallcomb v. Cross*, *Ld. Raym.* 252.

I do not say that the mere fact of the sheriff taking security for a return of the goods, as a bond or the like, and giving them up to the debtor, will discharge the goods from the binding effect of the writ in favour of a purchaser from the debtor. It must depend upon the circumstances whether it will, as against the sheriff, have that effect or not. If the debtor be not a trader buying and selling goods and the sheriff have no reason to believe the goods he gives up would be sold by the debtor, I should say the goods will still be bound by the writ, so that a purchaser from the sheriff would not acquire a good title as against the execution.

But if the debtor were a trader in the goods seized, and the sheriff gave them up and took security for their return, knowing the debtor would go on selling his goods the moment he got them back and that he would carry on his business just as usual, the sheriff could not, I think, after a sale by the debtor of any of his goods, take them under the execution.

So if the sheriff, with or without security for a return of the goods, license the debtor to sell, and he does sell the goods given up to him, the sheriff cannot, in my opinion, take these goods from the purchaser.

Now a license of that kind or consent may be implied as well as expressly given. And the evidence to support it would probably be that the sheriff knew the debtor was, after the return of the goods to him, dealing with them by sale and otherwise as his own, or that he did not concern himself about the goods for a considerable length of time, although it was not only his duty to watch over the goods, but he could conveniently have done so.

There are expressions in *Castle v. Ruttan*, 4 C. P. 252, which indicate the sheriff may not be able to proceed against a purchaser from the debtor when by reason of his conduct a purchaser has innocently bought from the debtor.

The sheriff too may be justified in acting on the writ when the creditor will not be justified, as in *Samuel v. Duke*, 3 M. & W., 622, at pp. 630, 631. And so also, I think, a creditor may be justified in acting upon a writ when the sheriff is not. And this is an action against the sheriff, not against the creditor. It is not necessary therefore to shew the creditor had a right to proceed with the execution, for it is not asserted he stayed or desired possession to be given up, or that he prejudiced his rights in any way by anything he did. It is sufficient for this action that the sheriff has conducted himself in such a way that the plaintiffs, as purchasers of the goods from the debtor, are entitled to be reimbursed by the sheriff for the value of the goods which they bought under such circumstances as to preclude the sheriff from taking them from the plaintiffs to satisfy the execution.

I think the evidence warranted the learned Judge finding as he did for the plaintiffs in respect of all the lumber they bought from Milne, which was taken from them by the sheriff.

GALT, J.—This was an action of replevin tried before Patterson, J. A., at Hamilton.

The action was brought against the defendant, who as sheriff, had seized and taken certain lumber out of the possession of the plaintiffs under two writs of execution against the goods and chattels of one T. T. Milne, the one dated January 18th, 1882, and the other February 15th, 1882.

The plaintiffs claimed title under a sale of the lumber made to them by the said Milne on March 6th and 7th, 1882.

After the delivery of the first writ the deputy sheriff made a formal seizure, but did not leave a man in possession.

Milne called on Mr. Laidlaw, the plaintiff's attorney and solicited him for some indulgence, in consequence of which the latter wrote the following note to the defendant,

"Dear Sir,

"Hatton v. Milne,

"The defendant assures me that he is expecting to receive money on a contract in about two weeks, and I am willing that he shall be allowed this extension of time for payment of this execution, and that you shall not advertise his goods or press the execution in the meantime."

There was a second writ placed in the defendant's hands, as already mentioned, but the first is the only one set out in the statement of defence. The learned Judge, however, allowed it to go in in support of the counter-claim, but expressing some doubt as to doing so in reference to the defence.

I do not think this is of any consequence, as I consider the first writ is sufficient to raise any defence which may be open to the sheriff.

It is, however, important in this respect, that when the second writ was placed in the sheriff's hands positive instructions were left at his office, and also were given to the deputy sheriff, that *both* writs must be returned immediately. This was some fifteen or sixteen days before the sale to the plaintiffs.

A few days after the sale the plaintiffs' attorney wrote to the defendant stating he had heard the lumber had been removed to the premises of the plaintiffs, and directing him to proceed at once to realize on the executions. The defendant accordingly took possession of a quantity of lumber then in the yard of the plaintiffs, and removed the same.

There was some discussion between the plaintiffs and the defendant before this was done, but as no arrangement was arrived at, it is unnecessary, in considering this branch of the case, to set out the evidence, the simple question being whether the sheriff was justified in taking the lumber out of the possession of the plaintiffs under the authority conferred upon him by the writs of execution placed in his hands on 18th January, 1882, and 15th February, 1882, they having in the meantime become the purchasers from the execution debtor without any knowledge on their part of the existence of the judgments and executions.

The learned Judge was of opinion that they had no such knowledge, and I am willing to accept his judgment. correct so far as actual knowledge is concerned; but it is hardly possible to conceive a case in which more reckless indifference could be shewn than was exhibited by the plaintiffs in that now before us.

The plaintiffs are engaged in the buying and selling lumber, and have also a mill and carry on business at Hamilton. Milne was also engaged in buying and selling lumber, and had a yard in the same city. The dealing between the parties was carried on through the intervention of the agent of the Merchants' Bank, that institution having a claim against Milne; in fact Milne swears positively that the sale was made to the plaintiffs by that agent and not by himself. At any rate the plaintiff knew the consideration was to be paid to the bank, for he says himself: "I was to give Mr. Milne a note of three months for the purchase money, and Milne told me in case I did not see him to leave the note with Mr. Gault, the agent, for him, and I accordingly did so. I went up to Mr. Milne's house, and Milne was not there." He says also in answer to the question: "Now, you knew at the time you dealt with Milne that he was in embarrassed circumstances." "Yes. I did not know he was insolvent, but I knew all along he was in low water. I had never heard anything about the sheriff seizing his goods until the sheriff came down, when I gave the undertaking."

The purchase made by the plaintiffs was not one in the ordinary course of Milne's trade. It was of his whole stock, and if, under the circumstances of this case, a purchaser is not affected by a writ of execution in the hands of the sheriff, he never can be unless the sheriff has a man in possession, and is in no case called upon to make enquiry as to executions in the sheriff's office.

The case of *Samuel v. Duke*, 3 M. & W. 622, contains a statement of the law as respects the effect of a *fi. fa.* when placed in the sheriff's hands for execution, and which is still the law in this Province, as that case was decided

re the law was changed in England, and while it was same as it now is in Ontario.

It was an action of trover brought against the sheriff, bailiff, and the execution creditor Ford, for the seizure and sale of certain goods claimed by the plaintiff, who had chased them from the execution debtor. The writ had been placed in the sheriff's hands in December, 1836, and the sale complained of did not take place until May, 1837. There had in the meantime been several transactions between Browning, the execution debtor, and Ford, the execution creditor; and it was found by the jury, which finding was afterwards upheld by the Court, that Ford had abandoned his execution before the sale, and consequently judgment was given in favour of the plaintiff against all defendants. A rule *nisi* having been granted the effect of the writ of execution was fully discussed by the Chief Baron and by Parke, Baron.

The latter, in giving judgment, says, at p 629 : " Now it is perfectly clear to me, both upon decided cases and the reason of the thing, that after a writ of execution has been delivered to the sheriff, the defendant may convey his property; but that the sheriff has a right to the execution notwithstanding the transfer. Since the Statute of Frauds, the right which was given to the sheriff by the writ to seize property, no longer speaks from the teste of the writ, but from the date of its delivery, upon the receipt of which the sheriff is to levy; but, subject to the execution, the debtor has a right to deal with his property as he pleases."

In considering the position of the defendant Duke, the Chief Baron, the learned Judge says, at p. 630 :—" If a distinction had been made at the trial between him," the execution creditor, " and the sheriff, I should have doubted whether the sheriff could have been made responsible in this case upon different pleadings. The sheriff is to look to the writ only, and he would be justified under it in seizing all that were Browning's goods at the time of its delivery to him, unless he had received a countermand from Ford himself. * *

to make it to be perfectly clear that the property passed to

the plaintiff, and that the sheriff was justified in the seizure of that property, unless the plaintiff was in a condition to shew that at the time of the conversion he had the lawful possessory right to the goods."

In that case it was held he had done so because the execution creditor had abandoned his execution before the sale to the sheriff.

In the case we are now considering the action is against the sheriff alone. There is no evidence whatever of an abandonment by the execution creditor, and all that can be said is, that the sheriff did not act as promptly as he might, and perhaps should have done, in enforcing payment by the debtor; and it is manifest that the plaintiffs although dealing with a man whom they knew "to be in low water," for a purchase of his whole stock, took no steps whatever to ascertain whether there were any writs in the sheriff's hands against him.

I am therefore of opinion that, so far as any of the lumber seized had belonged to Milne, the verdict should be in favour of the defendant.

From an exhibit put in at the trial, I find that the following quantities of lumber set out in the statement of claim, beginning at 1,170 feet, common inch, to the last item, 5,622 feet, 2 inch plank, was according to the evidence of the plaintiff John Patterson, given at the trial, amounting in all to 16,698 feet, and of the value of \$244, formed of the lumber so purchased.

The statement of claim contains a demand of other quantities of lumber amounting in all to 34,624 feet, which, according to the evidence of the plaintiff, had not been purchased from Milne, but which had been seized and taken by the defendant under the writ against him.

The plaintiffs are entitled to a verdict against the defendant as respects this, for as it never was the property of Milne the execution against him conferred no authority on the sheriff to seize and take it. There was no contradictory evidence; it rests entirely on the evidence of the plaintiff John Patterson, and was not questioned. The reason

the sheriff thought himself entitled to seize this lumber **was**, that having seized a certain quantity in the yard of **Milne** which he thought had been afterwards received by **the** plaintiffs, he was authorized to take a like quantity **from** them. In this he was clearly mistaken; he could **take** only that which had been the property of Milne, and **which** was bound by the delivery of the *fi. fas.*; he could **take** none other.

There will, therefore, be a verdict in favour of the plaintiffs for this lumber, with damages reduced to four dollars.

In consequence of the view taken by the learned Judge, **that** the plaintiffs were the owners of the lumber purchased **from** Milne, irrespective of the execution, the defendant's counter-claim was dismissed. As we are of a different **opinion** it is necessary now to consider it.

It is as follows: "And the defendant, by way of counter-claim, pleads the facts and circumstances hereinafter set forth, and shews that the plaintiffs by their undertaking in writing, signed by them under the name, style, and firm of "Patterson Bros.," bearing date the 21st March, 1882, and while the said writ of *fieri facias* was in full force and unsatisfied in the hands of the defendant for execution, promised and agreed, for a valuable consideration in that behalf, to deliver up to the defendant the said goods and chattels in the statement of claim set forth as and for the goods of the said T. T. Milne, or to account and pay over to him the value thereof, and therein the plaintiffs have made default; and the defendant claims to recover from the plaintiffs the value of the said goods," &c.

As already stated, the sheriff had made a seizure under the writ of 18th January, 1882, although he had not left a man in possession; he had also received another writ on 15th February, 1882, but nothing was done under it beyond making what may be called a nominal seizure. On the 6th and 7th March Milne had sold all his lumber to the plaintiffs, who had at once removed it to their own premises. On the 22nd March, in consequence of peremptory instructions from the attorney of the execution creditor, the deputy

sheriff went to the yard of the plaintiffs, and demanded the lumber.

The plaintiff John Patterson, in his evidence, says: "The deputy sheriff and bailiff Smith came down there, and the deputy sheriff said I had to pay him immediately the value of the lumber I had taken from Milne or else deliver it up, and that if I did not do so he would put them in possession. I said I wanted time to see about it. He said no, he would have no more fooling, he was humbugged enough, he would put the bailiff in. I said I would like to see if the sheriff had a right to it, and he said that if I would give an undertaking that if the sheriff had a right to it to deliver it to him he would go away, and so I said I would; so he wrote that out, and I was rather excited and glanced at it and signed it."

The undertaking is: "We hereby undertake to deliver up to the sheriff of Wentworth or account to him for, the lumber removed by us from the premises of T. T. Milne, builder, city."

"Given under our hand.

(Signed,)

"PATTERSON BROS."

After this was given the deputy sheriff withdrew. Some discussion afterwards took place, but finally, as no settlement was arrived at, the sheriff, on March 30th, sent and removed all the lumber the subject of this suit. It was admitted at the trial by the plaintiff John Patterson, that after this undertaking was given some of the Milne lumber was sold by them. The evidence, as respects all the Milne lumber, is not very lengthy, and I therefore extract it. Q "What disposition had you made of the lumber taken from Milne prior to 22nd March?" A. "Sold it just the same as lumber we bought from anybody else." Q. "Was anything done, or what was done, with the lumber between the 22nd March and the 30th March?" A. "Well, some of it went out the same as usual."

Unfortunately no evidence was given as to the quantity so disposed of.

From the foregoing statement it appears some of the

number was sold prior to the 22nd March, and some of it between that date and the 30th March..

As regards the first period, the defendant is not entitled to recover. I have already shewn from the case of *Samuel Duke*, that a writ of execution when placed in the hands of the sheriff does not deprive the defendant of his right of property in his goods; he has the power to sell and dispose of them, but the sheriff has a right to the execution, notwithstanding the transfer; that is to say, he has a right to take any goods which he can shew were bound by the execution, but he has no right of action to recover the money for which they may have been sold, even from the execution debtor, much less from a purchaser from him; that so far as any sales prior to the 22nd March are concerned the sheriff has no claim against the plaintiffs. But respects sales made after the undertaking was given, the case is different. The deputy sheriff, at the request and for the convenience of the plaintiffs, agreed to refrain from leaving a man in possession and removing the stuff, upon which they undertook to account to him for it. They are therefore bound so to do. The defendant is therefore entitled to a verdict, but as the damages are unknown it must be referred to an official referee to ascertain the amount.

I agree with my brother Osler as to the question of costs.

OSLER, J.A.—It is clear that on 15th February there were in the hands of the defendant for execution two writs of *fieri facias* against the goods of Milne. It is also clear that from that time nothing was done either by the execution creditor or his attorney to affect the binding operation of these writs upon the debtor's goods under the statute.

Says Lord Abinger, in *Samuel v. Duke*, 3 M. & W. 622, at p. 628: "I take it to be quite clear that the property is not changed by the delivery of the writ to the sheriff: it is still in the debtor, and may be dealt with by him subject to the claims upon it. It is merely bound from that time so as to enable the execution creditor to pursue it with all his rights."

There are many cases, such as *Payne v. Drew*, 4 East 523; *Pringle v. Isaac*, 11 Price 455; *Foster v. Glass*, 26 U. C. R. 277; *Castle v. Ruttan*, 4 C. P. 252, where, as between two execution creditors, the one whose writ is later in point of time has been held entitled to precedence, because the other has given directions to the sheriff to withdraw from possession or delay proceedings on his writ. The earlier writ is as against the later one treated as being fraudulent, or as not being in the sheriff's hands for execution.

But these cases do not govern the one before us, which is a case between the sheriff, acting under the execution, both of which he is entitled to rely upon, and should, if necessary, be allowed to plead, and the purchasers from the execution debtor. To take it out of the operation of the statute they must shew that there was either an abandonment of the executions, or such conduct on the part of the sheriff or execution creditor as to estop them from asserting that as against the goods in question the executions were in force.

Nothing, as I have said, can be alleged against the execution creditor; and as to the sheriff, he either did not act upon the writs at all until after the sale, or he made a formal seizure on the 15th or 16th February, and took an undertaking from the manager of the bank, (without so far as is shewn, any communication with the execution debtor), to be responsible for the safe custody of the goods if a man was not put in possession.

I do not find that the sheriff or his deputy either did or omitted to do anything else.

In *Gates v. Smith*, 13 C. P. 572, where many cases are referred to as to the sheriff's right to withdraw from possession and take an indemnity or undertaking for the return of the goods, it was held that it was not illegal for the sheriff, after having withdrawn from possession at the instance of either the creditor or the debtor, to retake possession at any time during the currency of the writ.

In *McGivern v. McCausland*, 19 C. P. 460, the writ was

in the sheriff's hands for execution about the end of **August**, 1868. On the 3rd of October following the judgment debtor gave the plaintiff a chattel mortgage on his **goods**, which was duly registered, and in January, 1869, **the** sheriff seized them. There was no evidence that the **execution** creditor or his attorney had authorized the sheriff **to** delay the execution of the writ.

A verdict was obtained by the mortgagee in an action **of** trover brought by him against the execution creditors **and** the sheriff. This verdict was set aside.

From the judgment of the Court, which was delivered by Mr. Justice Gwynne, I extract the following passages, **which** appear to me to lay down clearly the principles **upon** which the main question involved in this action must **be** determined :

"Although *Foster v. Glass*, 26 U. C. R. 277, and *Castle v. Ruttan*, 4 C. P. 252, establish that the sheriff may deal **with** an execution in his hands to be executed, and with **the** execution debtor in respect thereof, in such a manner **as** to deprive himself of the right of setting up such prior **writ** as a defence to an action against him *for a false return* **to** a subsequent execution placed in his hands, these cases **do** not, as it appears to me, govern the present. * * If **the** plaintiff here was an execution creditor, claiming that **the** conduct of the sheriff exposed the goods of the debtor **to** the plaintiff's writ as goods of the debtor not in *custodia legis* under the first writ, those cases would apply but the **position** of the plaintiff is very different * * from that of **an** execution creditor at the time the chattel mortgage was **executed**. * * Withdrawal, then, from possession * * is not **a** satisfaction of the writ so as to constitute the sheriff the **judgment** creditor's debtor in lieu of the execution debtor : **it** operates only to remove the goods from the seizure until **another** seizure shall be made, so as to let in an intervening **execution**, which *eo instanti* of its delivery to the sheriff **binds** the goods not under seizure ; but an alienee from the **judgment** debtor takes only such an interest as the debtor **himself** has, that is, an interest liable to seizure under such

writs as were then in the sheriff's hands. * * There is, then, a marked difference between two execution creditors claiming to affect the goods of a judgment debtor, and an execution creditor, whose writ is in the sheriff's hands to be executed, claiming against an alienee; and there is no hardship in recognizing this distinction, for the alienee is a person who takes by contract from the judgment debtor who can only give what he himself has, and the alienee can by search in the sheriff's office inform himself of the fact of there being a writ in the sheriff's hands which binds the goods, unless the writ be fraudulent, or illusory, abandoned, in any one of which cases the judgment creditor may be barred as against the alienee; but if it be fraudulent, or illusory, or abandoned, there can be no pretence for saying that the judgment creditor cannot pursue his remedy against the goods; and if he be not barred, *cadit questio* as to the sheriff, who * * can never be liable if the right of the judgment creditor is unassailable."

This case appears to me a clear authority for saying that if in the present instance Patterson had brought an action for trespass or conversion, instead of replevin, against the execution creditor and the sheriff, he could not have succeeded against either of them as regards the goods bought from the judgment debtor; unless the fact of the sheriff's withdrawal from possession, instead of merely not seizing, makes any difference. I do not think it does, so long as the subsequent seizure was made while the writ was in force.

I may refer here to *Castle v. Ruttan*, 4 C. P. 252. When that case was decided, writs of execution were returnable on a day certain instead of as now immediately after the execution thereof, though if the execution was commenced as by levying on it, it might be completed after it was returnable. The sheriff had made a seizure of the goods, taken a bond from the execution debtor for the delivery thereof when required, and allowed him to remain in possession and carry on his business as before the seizure. When thus in possession, and after the return day of the writ /

expired, a second execution came in at the suit of another creditor. It was held that the second writ took precedence of the first and bound the goods, and the sheriff was therefore liable for a false return to the second writ, which had gained priority by reason of his delaying to act upon the first until after it had expired.

Macaulay, C. J., says, at p. 259: "The bond * * shews, I think, that on receiving it the defendant withdrew from the custody of the goods and relinquished the seizure, although he not mean to abandon the writ. If the plaintiff, Urquhart's," (the first) "writ was not returnable when Castle's writ" (the second) "was received, I dare say defendant might have levied again *under both*, and sold under Urquhart's *as having priority over Castle's*. But it had been long returnable, and after what had occurred, the defendant could not seize *de novo* under it without committing a trespass."

Elsewhere in the course of his judgment, commenting on the case of *Jones v. Atherton*, 7 Taunt. 56, he observes, at p. 261: "A writ not acted upon until after it is returnable ceases to bind the goods—a levy under it could not be justified, and a writ under which a levy has been made before it was returnable, and abandoned, appears to me to stand in a like position; the levy could not be repeated, or the goods resumed, after the writ had expired."

I quote these passages to shew that the ground of the decision was, that the levy having been abandoned the goods ceased to be in *custodia legis* under the first writ, and as a fresh levy could not be made upon it after it had expired, the second writ took precedence. But that the goods remained bound by it so long as it was in force seems not to have been doubted. This case and that of *Foster v. Glass*, 26 U. C. R. 277, also shew that the sheriff cannot interpose a writ between the writ of another creditor and the goods, and by attempting to do so he may make himself responsible to the latter.

I do not, however, mean to say that the sheriff may not so act as to authorize the execution debtor to sell the

goods. In other words, his conduct may be such as to estop him from impeaching the sale; and of this the case of *Carruthers v. Reynolds*, 12 C. P. 566, referred to by the learned Judge, is an illustration.

There the execution debtor sold the goods with the knowledge and consent of the sheriff. He was, as it is said, the *quasi* agent of the sheriff for that purpose.

Gould v. White, 4 O. S. 124, is a case where, as against a purchaser, the execution was held to have been abandoned because an unqualified discharge of it had been given to the execution debtor before the sale.

So if a sheriff after seizing the stock-in-trade in a store or other going concern, permits the business to be carried on from day to day as before in the usual course, I have no doubt he would be bound by sales made in that manner.

In such cases it would plainly be a fraud on the part of the sheriff or the execution creditor to attempt to enforce the writ against the purchaser. Here the deputy sheriff at most withdrew from possession, taking, as he says, but which is denied, the undertaking of the bank manager to be responsible for their safe custody.

I think it is not a legitimate inference from this state of facts that, to use the language of the learned Judge, the deputy sheriff either intended that Milne or Gault should sell the goods, or that he contemplated, if he did not actually intend, that they might be sold, as they afterwards were.

In my opinion, the sheriff, in withdrawing from possession in case of the debtor, whether he takes a bond or undertaking for the forthcoming of the goods or not, is, as regards the continued operation of the writ and his right to execute it, in the same position as if he had merely delayed the seizure. I cannot agree that by taking security for the production of the goods he is to be treated as impliedly assenting to their sale by the debtor free from the writ.

I fail to see anything unusual or improper in the conduct of the sheriff or his deputy, beyond the fact that he seems to have acted with much leniency towards the debtor, and

Thereby to have exposed himself by his carelessness to a serious risk.

As to the *bona fides* of the plaintiffs, and the fact as found by the learned Judge that they bought without notice of the writ, this may all be assumed in their favour, and yet if they had searched in the sheriff's office before completing such a transaction as the purchase of the stock-in-trade of a debtor, who had absconded before they had paid their purchase money, they would have sustained no loss, although in that case the manager of the Bank might not have succeeded in the object he appears to have had in view.

The giving by the plaintiffs of the note for the purchase money to Gault, the bank manager; his procuring the debtor's wife to endorse it, ostensibly as agent, for her husband, after he had absconded, and then procuring from the plaintiffs in lieu of it another note payable to their own order and endorsed to the bank, all stamp the transaction as an extremely irregular one, and make it difficult to believe in the honesty of any one who was a party to it.

I am of opinion that the executions were not abandoned, and that nothing happened to disentitle the sheriff to levy on the property sold to the plaintiffs by the judgment debtor.

I agree that the plaintiffs are entitled to recover as to all their own lumber which the sheriff took under the erroneous idea that he was at liberty to seize a quantity equal to that which they obtained from the execution debtor, and as to the residue the defendant is entitled to judgment.

The defendant is also entitled to damages on his counter claim upon the plaintiffs' undertaking for all the lumber sold by them out of the stock purchased from the execution debtor after such undertaking was given, until the execution of the writ of replevin.

The undertaking is not obnoxious to the objections which were taken to it, as the lumber was in fact liable to be seized under the executions.

As to costs. I think the defendant should have the

costs of any reference as to damages, but inasmuch as both parties succeed as to a substantial part of the subject matter of their dispute, I think neither of them should have any other costs.

Order accordingly—

[COMMON PLEAS DIVISION.]

NOLAN V. DONNELLY ET AL.

Bill of sale—Description of goods—Stock in trade—Assent of creditors.

In a deed of assignment for the benefit of creditors, goods and chattels were described as all the stock in trade, goods and chattels, &c., including, among other things, all their stock in trade in which they assignors, "now have in their store and dwelling in the village of Renfrew."

Held, description insufficient, in that the kind of stock in trade should have been mentioned.

The safest course in these cases, in the present uncertain state of the law, is, for the assignee to take possession and keep it.

The assignment was executed by one partner, at the request of his co-partner, in the partnership name, and was made at the request of several creditors.

Held, that the assignment was properly executed, and that there was sufficient assent of the creditors.

INTERPLEADER, to determine whether the goods in question of Costello Brothers, taken in execution on the 5th of July, 1883, by the sheriff of Renfrew, under a writ of *facias* at the suit of the now defendants against Costello Brothers were, or some part was, at the time of the seizure the property of the plaintiff against the now defendants.

The description is set out in the judgment of Wilson, J.

The cause was tried without a jury, at Pembroke, at the Fall Assizes of 1883, before Armour, J., who delivered the following judgment:

ARMOUR, J.—I find as to the claim of the said William Nolan that the sale of the goods purporting to have been made by the conveyance made by the execution debtors to him on the 29th day of June, 1883, was not accompanied by an immediate delivery and followed by an actual and continued change of possession of the said goods, and I have to determine therefore the question raised whether his conveyance contains “such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished:” R. S. O. ch. 119, sec. 23.

This clause has been altered from what it was originally in 20 Vic. ch. 3, sec. 4, by the change of the word “efficient” to “sufficient,” probably through ignorance of the essential difference of the two words, but I do not think that this alteration destroys the general effect of the clause in carrying out what was the intention of the Legislature in originally enacting it.

I had a personal knowledge of the framing of the original enactment and of the object and intention of its framer in framing it, and it was this: that the goods should be so described in the instrument referred to that a person charged with the execution of process against the goods of a debtor, on obtaining from the clerk of the County Court a copy of any such instrument given by any such debtor and by going to such debtor's premises with such copy, could by means of the description alone and without other aid pick out the goods described in such instrument from any other goods on the premises.

I think this intention of the framer was expressed in clear and unmistakable language, and that the English language does not contain words by which such intention could be more clearly expressed.

The Legislature adopted the words of the framer, and I think those words being plain, and their meaning being plain, they and their meaning ought to be given effect to as expressing the intention of the Legislature.

I find that the conveyance from the execution debtors to William Nolan does not contain such sufficient and full

description of the goods purporting to be thereby conveyed that the same may be thereby readily and easily known and distinguished.

I find, therefore, against the claim of the said William Nolan.

The learned Judge entered judgment for the defendants.

At the Michaelmas sittings of the Court, November 12, 1883, *Craig*, for the plaintiff, served a notice of motion to set aside the finding and judgment for the defendants, and to enter a verdict and judgment for the plaintiff, or for new trial, upon the grounds that the plaintiff established title to the goods in question, and the finding for the defendants is against law and evidence and the weight of evidence.

During the same sittings, December 1, 1883, *Delume* supported the motion. There was a sufficient description of the goods here. There is not only the general description of all the "personal effects, stock-in-trade, goods, chattels," &c., "whatsoever and wherever, and whether upon the premises where said debtor's business is carried on elsewhere," &c., but there is the specific description: "their stock-in-trade, goods and chattels which they have in their store and dwelling in the village of Renfrew &c. This latter description is clearly sufficient. There is not only the class of goods given, namely, "their stock-in-trade," *i. e.*, the goods in their particular trade, but there is the additional circumstance given of a fixed locality, namely, being in their store and dwelling in the village of Renfrew. It is not necessary that each specific article should be described. All that is required is to give such description that the goods may be easily identified, and this has been done here by describing the class of goods and giving their locality. He referred to *Ross v. Conger*, 14 U. C. R. 525; *Harris v. Commercial Bank*, 16 U. C. R. 437; *Re Thirkell*, 21 Gr. 492; *Fraser v. Bank of Toronto*, 19 U. C. R. 381; *Powell v. Bank of Upper Canada*, 11 C. P. 303; *Mason v. MacDonald*, 25 C. P. 435; *Holt v.*

Carmichael, 2 App. R. 644. The evidence, moreover, shews that there was an actual and continued change of possession. The assignee entered and took stock and was in possession of the goods.

Moss, Q. C., contra. Besides the objections argued by the other side, there was another objection taken by the defendants, namely, that the plaintiff to whom the deed is made is not a creditor of the assignors, and no creditor had signed the deed on the 5th July, when the seizure was made by the sheriff, or had assented to it before the seizure. The only act of assent which can be relied upon is, that at a meeting of creditors, which was held at Montreal on the 29th June, some of the creditors were present, and the result was that one of the debtors sent a telegram of that date to his firm at Renfrew to make an assignment at once to the plaintiff. The creditors had no communication with any one on the subject until after the seizure by the sheriff: *Andrew v. Stuart*, 6 App. R. 495; *Wallwyn v. Coutts*, 3 Mer. 707; *Browne v. Cavendish*, 1 J. & Lat. 606, 635; *Malcolm v. Scott*, 5 Ex. 601; *Brind v. Hampshire*, 1 M. & W. 365; *Williams v. Everett*, 14 East 582; *Burrill on Assignments*, 4th ed., p. 420, secs. 288, 289. The execution of the deed by one of the partners in the name of the firm was not sufficient. There was clearly no sufficient description. The description given of the goods is merely of the most general kind, namely, "stock-in-trade," without saying what kind of trade, whether for example groceries or hardware. The description of the locality is also most general. The number of the house and street should have been given. It certainly cannot be said to be such a description that the goods could be easily identified. The cases shew that the description is insufficient: *Howell v. McFarlane*, 16 U. C. R. 467. There was no change of possession. The cases so decide, and the learned Judge has so found: *Carscallen v. Moodie*, 15 U. C. R. 92; *McLeod v. Hamilton*, 15 U. C. R. 111; *Ontario Bank v. Wilcox*, 43 U. C. R. 460; *Doyle v. Lasher*, 16 C. P. 263, 270; *Wilcox v. Kerr*, 17 U. C. R. 168, in App. 18 U. C. R. 470.

Delamere, in reply. The creditors assented to the deed being made, and they are maintaining it still. The case of *Maulson v. Topping*, 17 U. C. R. 183, would, at first sight, create an impression that the creditors must sign; but the case in fact decides that it is sufficient if the creditors assent; and in *Goodeve v. Manners*, 5 Gr. 114, the then Chancellor, now Spragge, C. J. O., clearly lays it down that the assent is sufficient, and the same principle is laid down in the case of *Burrows v. Gates*, 8 C. P. 121. What was done here clearly constituted an assent. The test is, could the assignors have revoked the assignment and it is quite clear that they could not have done so. The execution by the one partner in the name of the firm is sufficient. It was so executed in the presence of the other partner, and at his request: *Moore v. Boyd*, 15 C. H. 513; *Regina v. McNaney*, 5 P. R. 438; *Wilson v. Stevenson*, 12 Gr. 239; *Stevenson v. Brown*, 9 U. C. L. J. 110; *Cameron v. Stevenson*, 12 C. P. 389; *Spooner Jones*, 3 C. Chamb. 481.

December 24, 1883. WILSON, C. J.—The description of goods in the assignment before us is as follows: "All the real estate, &c.; and also all and singular the personal estate and effects, stock-in-trade, goods, chattels, rights, and credits, fixtures, book debts, &c, and all other the personal estate and effects, whatsoever and wheresoever, and whether upon the premises where said debtor's business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatsoever, including among other things all their stock-in-trade, goods, and chattels which they now have in their store and dwelling in the village of Renfrew, aforesaid; also all and singular their personal estate and effects of every kind and nature," &c.

The question is, whether the locality of the stock in trade &c., being in the assignors' store and dwelling in the village of Renfrew, aforesaid, is sufficiently definite?

In *Harris v. Commercial Bank*, 16 U. C. R. 437.

the kind of goods was not described which were in the store and storehouse, otherwise than "all and singular, his stock-in-trade, wares, merchandize, goods, chattels, and effects whatsoever belonging to him and now being in," &c.

In *Howell v. McFarlane*, 16 U. C. R. 471, no locality being given, the description was held insufficient.

In *Wilson v. Kerr*, 17 U. C. R. 168, and in appeal, 18 U. C. R. 470; the general designation of *stock-in-trade* was held not to be sufficiently specific. And in *Mason v. McDonald*, 25 C. P. 435; Hagarty, C. J., at p. 438 said, "Even if we could hold the *stock-in-trade* as sufficiently described (a very doubtful question) &c."

Stock-in-trade "is certainly a very general term, and may mean any kind of trade goods, according to the business the assignor was carrying on in the particular place mentioned. It is not so general as the term "goods," because the words *trade goods* are a qualification of the genus. A more specific designation than "trade goods" or "*stock-in-trade*," may no doubt be given, as my *stock-in-trade* of groceries or hardware or dry goods or lumber, and the like. But the same may be said of the term *household furniture*, for that in some cases may pass tenant's fixtures, though not as a rule: *Finney v. Grice*, 10 Ch. D. 13. Yet *household furniture* is said to have been held to be a sufficient description, and sufficient also without any locality being assigned to it excepting by implication: *Fraser v. Bank of Toronto*, 19 U. C. R. pp. 386, 387.

I do not know what advantage it is to add to the words "all my *stock-in-trade* which I carry on in such a place, &c.," the further words "consisting of dry goods," or the like, for *dry goods* is a description about as indefinite as *stock-in-trade*, and extrinsic evidence it is said can be given in such a case, and so the kind of *stock-in-trade* which was kept in the place can be accurately ascertained. See *Rose v. Scott*, 17 U. C. R. at p. 387.

Dry goods consist of cloths, velvets, silks, satins, laces, cottons, and probably of a hundred other articles. If *stock-in-trade* is not a sufficient description, neither on the like

construction can *dry goods* be, and something of the like kind may be said of hardware, groceries, and of other sorts of business.

If an assignment of my piano in my house is a full and sufficient description, my horse in my stable ought to be so too, but it is not, it seems; and yet for every one who could by extrinsic evidence establish the identity of a piano, fifty could be produced to identify the horse.

I can imagine a person owning some article or animal of a peculiar kind which would require no other description than the mere name of the article or animal to enable it to be easily known and distinguished. My yellow omnibus or even my omnibus, may be an article of that kind.

The law is in a most unsatisfactory condition on this subject. "Stock-in-trade" was once a good description. Now it is not. *Locality* of a mere loose chattel is held to be a full and sufficient description of it by which it may be easily known and distinguished, when it is impossible it can be such a description, or can enable such chattel to be easily known and distinguished, unless by attributing to a movable the characteristic of an immovable, and letting in as a consequence extrinsic evidence. The addition required to be made to *stock-in-trade* of the words "consisting of dry goods," or the like, does not improve the matter. The addition identifies the *kind* of goods, but it does not give a full and sufficient description by which the goods, *the same goods*, assigned may be easily known and distinguished. And it is doubted whether extrinsic evidence can be given: *Mason v. MacDonald*, 25 C. P. 439. And I think I have seen in some case that the goods should be so described that a person with the assignment in his hand would be enabled to point them out, while it is said in *Rose v. Scott*, 17 U. C. R. at p. 387, such evidence may be given outside of the conveyance to identify the goods.

It was also argued, the goods being said to be in the assignor's store, in the village of Renfrew, aforesaid, had not a sufficient locality given to them, the street on which the store was, or number of the store, should have been

given; but *Ross v. Conger*, 14 U. C. R. 525, was just so worded. See also *Wilson v. Kerr*, 17 U. C. R. 169.

Upon the decisions there is so little certainty, or unanimity with regard to the description of the goods, the locality, and the change of possession, that the safest course for the assignee is, to take immediate possession, and to keep it.

It is to be regretted that should be so, because the assignment, which is made for the general benefit of creditors, is defeated at the instance and for the purpose of giving to a single creditor a preference over all the others.

That is exactly the case at present. These defendants tried to gain priority by a private arrangement with the debtors. They refused to give it. The defendants then brought an action and got a speedy judgment under the new rules. The debtors knew the defendants were endeavoring to gain such priority by means of a judgment, and they with some of the creditors attempted to defeat it, to compel the defendants to share with the others in a ratable division. The assignment was hurried on and was executed in good time, and now, by reason of the complications and uncertainty of the law as to what is required to constitute a proper description of the goods, and what will constitute a sufficient change of possession, the general body of creditors is defeated, and the single litigious creditor carries off the whole. That is not and cannot be right. Why should not a debtor make an assignment of "all my property and estate which can be or is liable to be taken in execution for the satisfaction of debts or liabilities of every kind?" in substance like an insolvent proceeding, without any other particularity, and make the registration of that document in the county registry office a *supersedes* of all executions or process in the nature of execution not completely executed by payment of the execution, or by sale and payment over of the proceeds of any sale under the execution to his execution creditor, until the creditors can be called together, and determine how and in what manner to deal with the

estate of the debtor ; and if necessary any creditor should have the power to apply to have the estate administered in an action by creditors for the administration of the debtor's estate. The registration of the assignment being made notice to all persons of the making of the assignment and the fact of such assignment and registration should be published. Or why should not a creditor's action be made to have the like effect? I do not think that would be an invasion upon the powers of the Dominion. For the debtor may now assign his estate, and a creditor may now bring an action to have the debtor's estate administered. And by one or the other of these methods, or by a combination of the two, all difficulty of interfering with the Dominion powers may be avoided, and all embarrassment from conflicting and doubtful decisions will be set at rest and all injustice to the debtor and to his estate and to the general body of creditors will be put an end to. There will be then fewer interpleaders; and payments or transfers of property made for some reasonably short time before such assignment, or creditors action, may perhaps be also safely provided against, although not actually fraudulent, without interfering with Dominion powers.

At present I am obliged to hold the assignment invalid, because the kind of stock-in-trade is not mentioned.

The assignment, I think, is sufficiently executed by the one partner in the partnership name. It was so executed by and at the special request of the other partner. It was also made at the express instance of several of the creditors; and cannot be impeached upon the ground that it was not assented to by any of the creditors.

I think, so far as possession is concerned, the learned Judge was warranted in finding as he did. The decision, although quite legal, is not just. It is a further premium to litigious creditors to hold out against the others until the assignment is made, and then see if they cannot defeat it. If they succeed they gain all at the expense of the other creditors. If they find they cannot defeat it they then rank with the other creditors, and still gain quite as much as the others.

It is time that a race between creditors, and preferences by the debtor, should be put a stop to. It can be done by legislation which will be more satisfactory and effectual than by that which is now in force; and such a change will be as beneficial to the debtor as to the creditors.

The motion must be dismissed, with costs.

GALT, J., concurred (a).

Motion dismissed.

(a) This was argued before WILSON, C. J., and GALT, J., OSLER, J., having ceased to be a member of the Court on his appointment as Judge of the Court of Appeal, and the vacancy not having then been filled.

[CHANCERY DIVISION].

O'BRIEN V. O'BRIEN ET AL.

Deposit receipt—Gift by husband to wife.

One J. O'B., and B. O'B., his wife, were the holders of a certain deposit certificate of the Bank of British North America to the following purport: "Received from J. O'B. and B. O'B. the sum of \$2,800, for which we are accountable to either, with interest at current rate," &c. Three or four days before his death, J. O'B., called his wife to his bed side, and in the presence of P., gave her the certificate to her, saying she was to keep it for her own use, and unequivocally expressing an intention to make an absolute gift of the money to her. *Held*, J. O'B. having died, that his wife was entitled to the money in the Bank.

THE bill of complaint in this suit was filed by Elizabeth O'Brien against Bridget O'Brien, her mother, John O'Brien her only brother, James Allen and Edward Armstrong, the executors named in the will of James O'Brien, deceased, the plaintiff's father, the Bank of British North America and J. B. Brown and Sons, the indorsees of the deposit certificate which was the subject matter of the suit.

The circumstances of the case, and the evidence produced, as well as the defences raised, are sufficiently set out in the judgment.

The action was tried at Toronto on December 14th, 1881, before Ferguson, J.

Joseph A. Donovan for the plaintiff. The character of the deposit is certainly not such as to constitute a gift to the wife: *Marshall v. Crutwell*, L. R., 20 Eq. 328; and to what occurred at the time of the alleged gift, there is a discrepancy between the account given by the widow and the account given by Mrs. Price. But even conceding that the paper was handed over as is said, Mrs. O'Brien could not get the property without coming to this Court and getting it through the executors. I refer to *McCabe v. Robertson*, 18 C. P. 471; *Ward v. Turner*, 1 Wh. and T. L. C., 4th Am. ed., p. 1205; *McGonnell v. Murray*, 3 Eq. 460; *Cosnahan v. Grice*, 15 Moo. P. C. 215.

S. H. Blake. Q. C., for the defendant Bridget O'Brien. The form of the certificate clearly shews that the husband

added to make a provision for the wife. Then what place before the husband's death shews that the gift made either as a gift *inter vivos*, or as a *donatio tis causá*. It is necessary for the plaintiff to rebut presumption of a provision being intended, but no evidence has been adduced. What occurred before husband's death shews a continuance of that intention case is withdrawn from the category of imperfect. Besides, in the cases where the Court has refused interfere to perfect a gift, the claimant has been the plaintiff. In *McCabe v. Robertson, supra*, there was no very, and nothing on the face of the paper shewing right. Lastly, in any view of the case, there is no ent right in the plaintiff. I refer to *Watson v. Brad-*
le, 5 App. 666; Wilde v. Wilde, 20 Gr. 521; Low v.
ter, 1 Bea. 426; Moore v. Moore, L. R. 18 Eq. 474;
Wes v. Pascoe, L. R. 10 Ch. 343; Christ's Hospital v.
Agin, 2 Vern. 683; Gott v. Gott, 9 Gr. 165; Tiffany v.
Whe, 6 Gr. 474; Leake on Contracts, p. 453; Roper on
band and Wife, 2nd ed., vol. 1, p. 54; Williams on
utors, 8th ed., p. 765.

James Haverson for the executors.

Joseph A. Donovan in reply. *Yeatman v. Yeatman, L.*
Ch. D. 210. shews that the plaintiff can recover.

September 15th, 1882. FERGUSON, J.—The suit is brought Elizabeth O'Brien alleging that her father, the late as O'Brien, who had lived the greater part of his life e City of St. John, New Brunswick, at one time resi- for a short period in Toronto, and who died in the of Portland, in the State of Maine, in December, , made and published his last will on April 15th, , at the said City of St. John, and that under aid will she is the sole legatee of his money and per- property, subject to a life interest therein of her er, the defendant Bridget O'Brien, the widow of the tor. She states in her bill of complaint that the tor left no personal estate but the sum of \$2,800,

which he had deposited in the Bank of British North America, in Toronto. I may here say that the whole contention is as to this sum of \$2,800. The plaintiff asks that she may be declared entitled to it—that the will may be administered under the direction of the Court; an injunction restraining the bank from paying the money to the order of her mother, who had the deposit certificate, and who had endorsed it over to her agents or bankers, and that the bank be ordered to pay the money into Court.

After the commencement of the suit the bank paid the money into Court, where it now is, as I understand.

The defendant Bridget O'Brien claims to be entitled to this money as her own by reason of a gift of it to her by her husband before his death, and also by reason of the form of the certificate of deposit, and some statements as to the manner in which she and the testator had before deposited moneys. In her answer she says that she was not, until informed by the bill of complaint, aware that her husband had left a will; and she asks to have the bill dismissed, &c.

The defendants Allen and Armstrong say that the late James O'Brien did leave a will, and that they, as executors obtained probate of it, and they ask that the moneys in question should be paid to them as such executors.

The body of the deposit certificate is in these words—

“Received from James O'Brien and Bridget O'Brien the sum of \$2,800, for which we are accountable to either, with interest at current rate, which at present is four per cent. per annum, on receiving fifteen days' notice, and on delivery of this receipt. No interest to be paid unless the money remains in the bank three months.”

And it is signed on behalf of the Bank of British North America.

Nearly all the evidence was taken under commissions, of which there were three put in at the trial. For the plaintiff was put in and read a commission containing the evidence of the executors and of one Colleir, a banker, and to which was attached a probate of the will of the late

as O'Brien, issued from the Probate Court of the city county of St. John, N.B., and as appears by this, if it properly read at all, the will was formally executed in presence of two witnesses. No evidence as to the law of the Province of New Brunswick was given. The will, though not copied accurately in the bill of complaint, contains a bequest of the money of the testator to the plaintiff, subject to a life interest given to her mother, yet O'Brien. It is given to the executors in trust by the interest, &c., to Bridget O'Brien, for her life, and at her death it goes to the plaintiff, excepting \$1 that is due to the testator's son John, a defendant; but in case of the plaintiff's death before the decease of the testator, before the decease of her mother, leaving issue, the money is to be equally divided amongst such children, and in case of the plaintiff's death before the death of the mother, or before the death of her mother, without issue, the money is to go to the mother absolutely.

According to the testimony of the defendant Bridget O'Brien, she is somewhat peculiar, and not an educated woman; indeed, I would say almost illiterate. In her evidence she says that after she and her husband came to Portland he kept the \$2,800 certificate in a wallet in his camphor trunk: that three or four days before his death he gave the certificate to her. He brought her to his bedside and told her to go to the camphor trunk and bring him the wallet, at the same time giving her the key of the trunk: that she brought him the wallet and gave it to him: that he opened it and gave her the bequest--the certificate: that when he gave it to her he said, "Remember, Biddy, there is \$2,800 here; keep it for your own use; there is enough in the box to bury me, this is for your own use;" and that he then called in Price (the person with whom the old people were dealing), and made use of some language regarding their matter, the plaintiff, which I do not think it necessary to repeat here. It is shewn by the evidence that Bridget O'Brien was at the time it was taken seventy years old,

and that her husband was at the time of his death seven years older: that they had had a very large family—seventeen children, I think—and that nearly all of the children were dead. These old people had lived together nearly half a century. The money in question seems to have been accumulations from savings out of wages, he having been by trade a carpenter and carriage builder. The evidence given by Bridget O'Brien is somewhat voluminous, and much of it seems to have but little if any bearing upon the question in dispute. It shews, however, that the old people, their son John, and their daughter, the plaintiff, had not, in latter years at all events, been very happy in their intercourse.

Margaret Price, in her testimony, in answer to somewhat specific interrogations, says that she saw the certificate for the \$2,800 in the hands of the old man, James O'Brien, the week before he died: that he delivered this certificate to his wife, Bridget O'Brien, the week he died in his bedroom in her house in her presence: that he requested his wife, Bridget O'Brien, to call her (Price) to his bedside to witness his giving the certificate to her: that he had it in his hand and said to her (Price), "I take you to witness that this certificate belongs to my wife and no one else; and that he then, speaking to his wife, used language similar to that stated by Bridget O'Brien, and which there is no need of stating here.

It was urged to me that because these two witnesses did not entirely agree as to the words that were used by James O'Brien, and in some of the minor details of what occurred at the time, and that because Bridget O'Brien did not on the occasion of her cross-examination upon her answer state as fully what took place at the time of the alleged gift as she did in her examination in the cause that followed the same and the next day, and because of some other apparent discrepancies that were referred to, I should not give credence to their testimony. I do not take that view. Both the witnesses do swear to the main fact—the gift. There is no evidence to the contrary. The substance of the

fact deposed to is not impossible, unreasonable, or improbable. It is not the case of weighing the evidence of witnesses against that of other witnesses, and I do not think that what is referred to and urged as a reason for so doing is at all sufficient to justify me in concluding that two people, neither of whom I have ever seen, and whose veracity has not been impeached, committed or intended to commit perjury; and after a careful perusal of the whole of the evidence I am of the opinion that the proper conclusion is, that the gift was in fact made. Then what was the effect of it? In the case, *Hoyes v. Kindersley*, 2 Sm. & Giff., at p. 197, the Vice-Chancellor says:—

“ There is no doubt that this Court will support a gift by a husband to a wife during coverture for her separate use; but as stated by Lord Alvanley, and repeated by Sir Thomas Plumer in *Walter v. Hodge*, 2 Swanst. 104, there must be an unequivocal act by which the husband divests himself of the property and places it at the disposal of his wife. The transfer of stocks into the name of the wife

prima facie evidence of a gift to the wife, but it may be rebutted by evidence tending to shew that no gift was intended. In *Lucas v. Lucas*, 1 Atk. 269, there was strong presumptive evidence of an intention to give the South Sea Stock to the wife, and there being nothing to rebut it, the gift was supported by this Court.”

In the early case, *Lucas v. Lucas*, above referred to, it is said that in equity gifts between husband and wife have often been supported. In examining the authorities to which I was referred, I find nothing contrary to this.

As to the transfer and negotiability of certificates of deposit, I refer to *Daniel on Negotiable Instruments*, 2nd ed. vol. 2, secs. 1702, 1703. By the certificate in question, here the bank became “accountable,” that is, I think, promised to pay either James O'Brien or Bridget O'Brien the \$2,800 upon the conditions required being fulfilled. The document was given to Bridget as her own, and with the intention of giving her the money at the time. The act of the husband was, I think, unequivocal. He delivered

it to her, and she kept it in her possession and under her control. There was no further act for him or for any one to do to enable her to give the requisite notice to the bank, and at the expiration of the period present the certificate and obtain the money. I think this was not a case of an intended or imperfect gift, but, as contended by counsel for Bridget O'Brien, a completed gift to her, and if there were no other reason the plaintiff's case must fail. As to the effect of the American cases and the change that the law is said to have undergone as to the character of the thing given, see *White & Tudor*, L. C. 4th Am. ed. vol. 1, p. 1249.

It is also, I think, more than doubtful that the estate of James O'Brien was so represented as to enable the plaintiff to obtain a decree or judgment in her favour, even if the merits were in her favour. I refer to *Williams on Executors*, 8th ed., vol. 2, p. 366, *et seq.*, as to the effect of foreign probates of wills; also to *Hard v. Palmer*, 20 U. C. R. 208; *Grant v. McDonald*, 8 Gr. 468; *Sloan v. Whalen*, 15 C. P. 319, also *In re Thorpe*, 15 Gr. 76. There are other reasons depending on the nature of the plaintiff's alleged interest, the frame of her case, and the absence of certain evidence, perhaps non-existence of facts that would render it exceedingly difficult for her to succeed, even if the merits were deemed to be with her; but, as I am of the opinion that the bill must be dismissed, I do not think it necessary further to refer to them.

The bill—action—is dismissed, with costs.

A. H. F. L. J. L.

[CHANCERY DIVISION.]

SCOTT ET AL. V. GOHN ET AL.

Will—Construction—Codicil—Substitutional gift—"Heirs"—"Children."

A testator, after making certain bequests to his wife, directed that after her death, his executors should sell all his estate, real and personal, and after providing for certain pecuniary legacies, should give the legal interest on one-fourth of the remaining proceeds of his estate to his daughter E., to be paid to her yearly during her life, and after her death to be divided among her surviving children. By a codicil he willed to "E. and her heirs that share or division of my estate, as referred to in a former will, in land composed of the north east part of lot 7, concession 3, Markham." It appeared that the testator had put E. in possession of the said fifty acres some time before his death, and that the said fifty acres were about equal to one-fourth of the whole residue of his estate.

Held, that the devise to E. in the codicil was substitutional for the bequest to her in the will.

Held, also, that under the codicil E. took an estate in fee, and not one subject to the incidents of the original gift in the will.

IN NO CASE OF substitutional gifts has it been held that the subsequent gift is to go to the parties entitled under the subsequent limitation of the former gift.

The word "heirs" may sometimes mean "children," both in regard to personal and real estate, but that meaning will only be given to it when it is clear that the property was intended to go to the children.

THIS was a suit for a construction of the will of one Peter Stiver, deceased, wherein one Emily Scott, daughter of the testator, and her children, were plaintiffs, and William Gohn, executor of the said will, and certain other children and grandchildren of the testator, were defendants.

The provisions of the will in question, and the other facts of the case, sufficiently appear from the judgment.

The case was heard at Toronto, on November 20th, 1882, before Proudfoot, J.

At the hearing the infant plaintiffs were made defendants, and James Reeve was appointed to act for them.

McCarthy, Q. C., for the plaintiff Emily Scott. The gifts by the will and the codicil are cumulative. Substitution is not to be presumed: *Wilson v. O'Leary*, L. R. 12 Eq. 525,

C. in App. L. R. 7 Ch. 448. A will is not revoked by a codicil unless there is a clear intention to revoke. But if the gifts are not cumulative, but substitutional, the plaintiff takes the fifty acres in Markham in fee. I refer to *Heobald* on Wills, 2d ed., p. 219; *Jarm.* on Wills, 4th ed., vol. 2, p. 368; *Jesson v. Wright*, 2 Bl. O. S. 1; *Appleton v. Crowley*, L. R. 8 Eq. 139; *Herrick v. Franklin*, L. R. 6 Eq.

13; *Polden v. Bastard*, L. R. 1 Q. B. 156; *Lawrence v. Cetchum*, 28 C. P. 406, S. C. 4 App. 92; *Ruthven v. Ruthven*, 25 Gr. 534; *Green v. Tribe*, 27 W. R. 39.

James Reeve, for the infant plaintiffs made defendant. If it be held that Emily Scott takes the land in Markham in fee, substitutionally, her children will take no interest under the will. But the devise to the children of Emily Scott is by way of purchase, and the mother has no interest except the income of the one-fourth referred to. The testator's intention is to give the land to Emily Scott and her children in the same terms as in the will. Here, however, there is no expression of any intention to revoke the will. There is no inconsistency such as to imply revocation. At all events, the codicil should be interpreted so as to preserve the interest of the children. I refer to *Theobald on Wills*, 2nd ed., p. 423; *Jarman on Wills*, 4th ed., vol. 1, pp. 176, 181; *Ib.* vol. 2, pp. 359, 368, 382; *Cleobury v. Beckett*, 14 Beav. 583; *Murray v. Johnston*, 3 Dr. & W. 143; *Randfield v. Randfield*, 8 H. L. 225; *Burclay v. Maskelyne*, 5 Jur. N. S. 12; *Doe dem. Murch v. Marchant*, 6 M. & G. 81; *Doe dem. Hearle v. Hicks*, 8 Bing. 475.

S. H. Blake, Q. C., for Catharine Wiley, one of the defendants, a daughter of the testator. Substitution is clearly intended. The only question is, whether the devise to Emily Scott was for life or in fee. *Jesson v. Wright*, 2 Bli. O. 1, is not law now. *Russell v. Dickson*, 4 H. L. C. 293, gives the rule of construction. I also refer to *Theobald on Wills*, 2nd ed., p. 114, et seq.; *Ib.* p. 142, 576; *Moggridge v. Thackwell*, 1 Ves. Jun. 464; *Wilson v. O'Leary*, L. R. 12 Eq. 525, S. C. in App. L. R. 7 Ch. 448; *Boulcott v. Boulcott*, 2 Dr. 25. There is no intention here to diminish the share of the other three daughters, Susan, Catharine, and Elizabeth. The word "heirs" in the substituted gift should be read "children." Cases of revocation, and cases of substitution, are entirely different. The case here is one of substitution: *Green v. Tribe*, 37 W. R. 39, was a case of revocation.

J. Crickmore, for the other defendants. The word "as" in the codicil, is equivalent to "in like manner," and therefore

fore the gifts are not cumulative. The word "heirs," in the codicil, are words of purchase, and the children are meant. I refer to *King v. Beck*, 15 Ohio, 559; *Chew's Appeal*, 37 Penn. 23.

McCarthy, Q. C., in reply. The meaning of the language used shews intention, and the surrounding circumstances do not prevail over the language used as evidence of intention. I refer to *Emmins v. Bradford*, L. R. 13 Ch. D. 493. But, in fact, the surrounding circumstances here are rather in favour of the view that the plaintiff was to take the fee in the fifty acres. The testator put her in possession of the land. He probably thought he had given it to her, and he added the codicil to the will to shew he did not mean to take it from her. But it is better to leave the circumstances alone, and interpret the will by the language. The codicil must not be held to revoke more than is necessary. See *Jarman on Wills*, 4th ed., vol. 1, p. 170-6; *Green v. Tribe*, 37 W. R. 39; *Boulcott v. Boulcott*, 2 Dr. 25; *Duffield v. Duffield*, 3 Bli. N. S. 260. If "heirs," in the codicil does mean "children," then the plaintiff and her four children, born at the death of the testator, take as tenants in common, and her after-born children are excluded. I refer to *Jarman on Wills*, 4th ed., vol. 2, p. 382; and to *Milroy v. Milroy*. 14 Sim. 48.

December 16, 1882. PROUDFOOT, J. — On January 1th, 1856, Peter Stiver made his will, and directed that his debts and funeral expenses should be paid; and, to his worldly estate, disposed, of it by giving to his wife certain bequests, and to his grandson Peter Scott (a son of the plaintiff), eight acres as soon as he became of age and his (testator's) wife should be dead. Then, after his wife's death, his executors were to sell all his real and personal estate, and divide the proceeds as follows:

To his daughter Ann Vanhorn, £50; and to her son W. Vanhorn, £10. To his daughter Susan one-fourth of the remainder of the proceeds. To his daughter Catharine one-fourth of the remainder of the proceeds. To his

daughter Elizabeth, the legal interest on one-fourth of the said remainder, to be paid to her yearly for her life, and after her death to be equally divided among her surviving children when the youngest attained twenty-one years:

"To my daughter Emily (the plaintiff) the legal interest on the one-fourth of the said remainder of the proceeds of my estate, to be paid to her yearly and every year during her natural life, and after her death the said one-fourth to be equally divided among her surviving children when the youngest arrives at the age of twenty-one years, or any portion of it may be paid sooner if my executors think it proper or necessary to do so."

By a codicil, dated April 4th, 1858, he devised as follows:

"I, Peter Stiver, &c., do hereby will and bequeath to my daughter Emily Scott and her heirs, that share or division of my estate, as referred to in a former will, in land composed of the north-east part of lot No. 7, third concession, Markham, and to be by admeasurement fifty acres."

It appeared that the testator had put the plaintiff and her husband in possession of the fifty acres mentioned in the codicil some time before his death, and that this portion of fifty acres was about equal in extent and value to one-fourth of the whole residue of his estate.

The questions are, whether the devise in the codicil to Emily is substituted for the bequest in the will to her and her children? and, if substitutional, what estate does Emily take, in fee, or for life with remainder to the children, or to her and her four children alive at the testator's death as tenants in common?

Where the bequests or devises to the same individuals are by different instruments, *e. g.*, by will and codicil, the presumption is, that they are cumulative; and more especially where they are not *ejusdem generis*, as a gift of maintenance by will, and a town lot by codicil: *Baby v. Miller*, 1 Er. & Ap. 218; or as in this case money by will, for life, and land in fee by codicil.

But the rules observed in construing such gifts are only to be applied when the intention is doubtful; where the

intention is plain the rules are discarded. There can be no doubt here as to the testator's intention. He gives to Emily and her heirs by the codicil the share or division of the estate, referred to in the will, in land, instead of in money as given by the will. It cannot be reasonably doubted that the share or division he means is that in which Emily was interested. There is nothing to shew that he intended to revoke the bequests to her sisters, or to diminish them. It is true, that in the will Emily takes nothing but the interest of the share or division for life. But the codicil does not give the land in lieu of her interest in the money, but in lieu of the share or division itself. Any other construction would make the codicil revoke the will to a very large extent, much greater than by the interpretation I put upon it; for it would not only diminish the residue by one-fourth, but would still keep up the division into fourths, and give Emily's children one of them, *i. e.*, it would give Emily four-sixteenths of the estate, and her sisters and her children each three-sixteenths, or Emily and her children by the joint effect of the will and codicil would take seven-sixteenths of the estate.

The rule was pressed on me that the revocation should not be to any greater extent than necessary to give effect to the intention. I acknowledge the propriety of the rule, and think that its application would not have the effect of permitting so grave a change in the dispositions of the will.

My opinion is, that the codicil substitutes the devise of the land to Emily and her heirs for the bequest of the money to Emily for life and to her children in remainder in the will.

It was contended on behalf of the children, that the substituted gift must be subject to the incidents of the original one, and that Emily takes only an estate for life in the land, with remainder to her children. One consequence of this would be, if the words *heirs* is to read *children*, as only four children were born at the testator's

death, that the mother and these four children would take as tenants in common, to the exclusion of the after born children: *Wild's Case*, 6 Rep. 17; R. S. O. ch. 105, sec. 1.

The rule of construction applicable to such a case is stated by Mr. Jarman (3rd Ed. vol. 1, p. 162) to be, not to disturb the disposition of the will further than is absolutely necessary for the purpose of giving effect to the codicil. The disposition in the codicil is to have full effect; but that a devise in fee to Emily, and leaves nothing for the will to operate on, unless *heirs* are to be read as *children*. That the words *heirs* may sometimes mean *children* is no doubt true, both in regard to personal and real estate, but that meaning will only be given to it when it is clear that the property was intended to go to the children. Where the entire subject is personal, the word *heirs*, if unexplained by the context, must be taken to be used in their proper sense: *DeBeauvoir v. DeBeauvoir*, 3 H. & C. 524 and 527. What is such an explanation of the context as will have the effect of making *heirs* mean *children*, may be seen in *Loveday v. Hopkins*, Amb. 273, and *Bull v. Comberbach*, 25 Beav. 540, which were bequests of personalty; and in *Milroy v. Milroy*, 14 Sim. 48, a devise of realty.

But nothing of the kind is to be found in this case. The share or division of the estate is entirely taken out of the will, it is given in land instead of in money, and the estate in the land intended to be given is only to be found in the codicil, and that estate in my opinion is an estate in fee.

In *Alexander v. Alexander*, 5 Beav. 518, the codicil revoked the disposition of the will as to the distribution of the residue, and the testator gave to his son a legacy of £20,000 in lieu of the one-third of the residue given to him by will, payable at twenty-five, and under some special conditions. It was held that the substituted legacy was not affected by the conditions attached to the original bequest. The revocation was treated as absolute, and in lieu of it an absolute interest in the legacy was given. The express revocation distinguishes that from the present

if it can be gathered that the intention was to revoke the original gift, the same conclusion would follow.


Thus in *Haley v. Bannister*, 23 Beav. 336, the testator by his will gave the trustees £20,000 in trust for his daughter for life, and after her decease in trust for her children as tenants in common, *to be vested in them when and as they respectively should attain "twenty-one, or be under that age, leaving lawful issue, living at his or her death."* The codicil providing "instead of £20,000, which I have left to my executors in trust for my daughter, leave them in trust for my said daughter only, £15,000, * for her life time, and * * after her decease her children, to be equally divided amongst them, *the survivors, share and share alike.*" The daughter had five children, all of whom attained twenty-one, but one died in their mother's lifetime. Under the will all of them would have been entitled, but it was held that only the survivors were entitled by virtue of the codicil. There was no express revocation of the clause in the will. The Master of the Rolls considered the legacy in the codicil as a new gift to those who survived their mother.

Mr. Theobald (p. 37, 1st ed.) places additional and substitutional legacies on the same footing in regard to being subject to the same conditions as the previous gift, which he limits to conditions in respect to vesting, separate estate, the fund out of which it is payable, and freedom from legacy duty.

He says it is not quite clear whether they will be subject to the same executory gifts over as the original gift; it seems, however, that they will not. And *Mann v. Fuller*, Kay 624, states the result of the cases as not having gone further than this; where the subject of the first gift is given absolutely to the party, or is made defeasible, the second gift has been held to be given upon similar terms; for example, if the former gift were absolute and free of legacy duty, the additional gift has been held to have all the same incidents; so if the former gift is to be

lost in a certain event, the additional gift is to be defeated on the same conditions. In no case has it been held that the latter gift is to go to the parties entitled under the subsequent limitations of the former gift.

Upon the whole, I think, the bequest in the will of a share or division of the residue to Emily for life, and at her death to her children, is entirely revoked, and the devise in the codicil of the land to Emily and her heirs takes its place.

A. H. F. 

[CHANCERY DIVISION.]

DIXON V. CROSS.

Right of way—Way of necessity—Registration—Notice—Short form deed—Landlord and tenant.

B. and W., becoming entitled in 1830, as tenants in common of one hundred acres of land, under a devise, made a partition thereof by agreement, whereby fifty acres were allotted to each in severalty. The fifty acres allotted to B. were enclosed, and there was no way out to the highway, except over the fifty acres of W., over which accordingly B. was allowed by W. to pass at will. In 1840, W. sold to E. the thirty acres of his fifty, next adjoining B.'s fifty acres, and also a strip for a road across the other twenty acres. In 1848 E. granted to B. the then owner of B.'s fifty acres a strip for a road along the north side of his thirty acres, and also the strip along W.'s twenty acres conveyed to him in 1840. This made a change in the course of the way theretofore used by B., and his predecessors, and was thenceforth the course followed by the latter, and was the right of way in question in this action: but this deed was not registered till 1882. B.'s parcel subsequently became vested in the plaintiff, under conveyances granting not only the land, but also all ways, &c., therewith used and enjoyed. The defendant claimed title to part of W.'s fifty acres by deed made in 1854, without notice, as he alleged, of the deed of 1848. The right of way in question had been used by the plaintiff, and his predecessors in title for over thirty years, prior to the obstruction thereof by the defendant, to restrain which this action was brought.

Held, that the effect of the will and agreement together was the same as if the will itself had devised the one half to B., and the other to W., and the plaintiff had a right of way of necessity over the defendant's land, and was entitled to an injunction to restrain the obstruction complained of; and it was not necessary for him to shew any express grant of the right of way by the defendant, or his predecessors in title.

Held, however, that the right of way would have passed under the grant of the land, and all ways, &c., used and enjoyed therewith, as also under a deed of grant drawn according to the Act respecting short forms of conveying, even if it had not been a way of necessity, and no such words were necessary in order to pass a way of necessity.

Held, also, that the subsequent express grant of a right of way by the defendant's predecessor in title, did not destroy the right to a way of necessity.

Held, also, that the defendant having notice of an actual travelled way across his land was affected, also, with notice of the origin, as well as the existence of the right.

Held, also, that changing the locality of the way, from time to time, by the agreement of the respective owners, did not destroy the right of way, nor could the grant of a certain specific line for the road put an end to the right, in case a purchaser should buy without notice of the grant.

Held, lastly, that any act of a tenant, without the knowledge or sanction of the landlord, could only affect his interest as tenant, and could not prejudice the reversioner.

Said, that a way of necessity does not give a right to the owner of the dominant tenement to cross any part of the servient tenement at pleasure, but is confined to a definite way to be determined by the agreement of the parties, or by the owner of the servient tenement, or of the dominant tenement in his default.

THIS was an action brought by Edward Dixon, plaintiff, against Michael Cross, defendant, claiming a declaration that he was entitled to a certain roadway from his land over the adjoining land of the defendant, and he claimed

to be so entitled in common with all persons justly claiming under one William Farrier, and one Elias Farrier, any part of the 50 acres next adjoining on the east side the defendant's land; and he also claimed an injunction to restrain the defendant, his servants, workmen, and agents from obstructing or interfering with him in his use and enjoyment of the said roadway, costs of action, and general relief.

The facts of the case are fully set out in the judgment. It may, however, be stated that the plaintiff claimed that at the roadway to which he was entitled was a roadway 25 links wide, as across the 30 acres immediately west of his, the plaintiff's land, and 50 links wide as across the remainder of the defendant's land to the concession road running along the western side of the defendant's land.

The case was heard at Toronto on December 2nd, 1882, before Proudfoot, J.

G. M. Evans, for the plaintiff. We claim a right of way by necessity, by deed, and by prescription. As to our right to a way of necessity, I cite *Turnbull v. Merriam*, 14 U. C. R. 265; *Pennington v. Gulland*, 9 Ex. 1; *Fielder v. Bannister*, 8 Gr. 257; *Saylor v. Cooper*, 2 O. R. 398; *Moore v. The Corporation of the Township of Esquesing*, 21 C. P. 277; *Woolrych on Ways*, 2nd ed., p. 29; *Gale on Easements*, 5th ed., p. 131. As to the right of way by deed, we claim that under the deed of July 3rd, 1848; and the way of necessity is not extinguished by the deed. As to prescription, it extends over a period of thirty years. As to the gate now complained of as an obstruction, the defendant had no right to put it up: *Jamieson v. Haymond*, Sir W. Jones, Rep. 221, referred to in *Gale on Easements*, 5th ed., p. 570; *Heward v. Jackson*, 21 Gr. 263. I refer also to R. S. O. ch. 102, sec. 4.

D. McMichael, Q. C. If the grantor did not grant a way of necessity, the defendants are not bound: *Woolrych on Ways*, 32; *Gale on Easements*, 5th ed., p. 131. Now, the devise in this case did not cause the necessity for a way of

necessity, for the devisees might have so divided the land as to give to each of them a road to the concession. The deed of July 3rd, 1848, sells a road, and so puts an end to any way of necessity. But this deed is no evidence against the defendant for want of registration, but it is good evidence against the plaintiff. When the plaintiff bought he did not have the road conveyed to him, and *Brett v. Clowson*, L. R. 5 C. P. D. 376, lays down the rule that, "except in the case of a way of necessity, every way a man owns does not pass by grant." Croft got a deed from Benjamin Farrier, but no way; then he got a grant of a way from Elias Farrier, but permitted it to be extinguished by a want of registration. The case is thus reduced to one of a right of way by user. But there is a distinction between public and private ways, and a private way cannot be in gross: *Gale on Easements*, 5th ed., p. 13. Moreover, the fact that the tract went out of the direct line in places prevents a continuous user of the line in question being established: *Reg. v. Plunkett*, 21 U. C. R. 536; *Bolton v. Walton*, L. R. 21 Ch. D. 968. I also refer to *Corporation of London v. Riggs*, L. R. 13 Ch. D. 798, and to R. S. O. ch. 62, sed. 10, and *Ib*, ch. 108, sec. 37.

January 10, 1883. PROUDFOOT, J.—David Farrier, who died in 1830, by his will made in 1827, devised to his wife the 100 acres, part of lot 4, in the 4th concession of Markham, for life, and he gave the above mentioned land to his two sons Benjamin and William, to each of them 50 acres, after his own and his wife's death, if they would take care of him and his wife till then. As this was supposed, in the then state of the law, to pass only a life estate, a quit claim was obtained from the eldest son John, the heir at law.

The land so devised at its west end fronted on a concession road, the east end abutted on the land of one Hemmingway, and on the north and south was bounded by the land of other persons.

Benjamin and William divided the 100 acres between

them, by a line nearly north and south. Benjamin chose the east half and William the west half. William's half thus fronted on the road, while Benjamin's half was landlocked.

The effect of the will and of this division was in my opinion the same as if the will had devised the east half to Benjamin and the west half to William, and thus Benjamin would have had a way of necessity over the west half; and so the brothers understood it, for William, who was examined as a witness, says that "Benjamin came out through my place when he pleased."

On January 18th, 1840, William sold to his brother Elias 30 acres off the east end of his 50, and a strip 50 links in width of the north side of the 20 acres he retained, thus giving Elias the fee of what was intended for a road from his 30 acres to the concession road. This deed was never registered, and when Elias sold to Michael Cross the defendant, in 1851, that deed was given up to William and cancelled, and he executed a deed dated March 15th, 1851 direct to Michael Cross, for the 30 acres, and a strip of a road 25 instead of 50 links wide.

On March 12th, 1845, Benjamin sold and conveyed the east 50 acres to Robert Croft, with the usual grant of ways, easements, privileges, appurtenances, &c., to the land belonging or therewith used and enjoyed. And on July 3rd, 1848, by deed of that date, Elias granted to Robert Croft a strip 25 links wide along the north side of the 30 acres, and also the 25 links he had received from William along the north side of the 20 acres retained by William, thus giving a roadway from the east 50 acres to the concession road, for which Croft paid to Elias \$22.50. The deed specifies that the strip is to be used exclusively for the purpose of a road by and between the said parties, their heirs and assigns forever. Up to this time the road used by Benjamin and Robert Croft, passed over Elias's 30 acres near the centre to his house, and from thence to the strip along the north of the 20 acres and over it to the concession road. Elias applied to Croft to have the road straightened. He

asked \$25 for the strip. Croft offered him \$22.50, which was accepted and the deed executed. This deed was not registered till May 22nd, 1882. From the time of its execution in 1848 Croft and those claiming under him used this strip for a road until the interruption complained of. The fences were moved to agree with this description. The track actually travelled did not, all the way, keep strictly within the 25 links. There was no fence on the north side of the strip for a considerable part of the distance, and in one or two instances, where a stump was in the strip, the track wound round it on the north side, encroaching on the land of another person, but there is still room enough for a team to pass between the stump and the fence on the south side. Robert Croft, by deed of October 1st, 1873, conveyed to his son Robert James Croft, the east 50 acres, and on July 5th, 1878, Robert J. Croft conveyed that 50 acres to the plaintiff Edward Dixon. On November 16th, 1881, Robert Croft, by deed of that date, after reciting the grant of the road to him by Elias Farrier, and that by oversight it had been omitted in the conveyance to R. J. Croft, granted the said strip to the plaintiff to be used exclusively for the purpose of a road by and between the said plaintiff and the heirs and assigns of the plaintiff and of Elias Farrier as owner of lands adjoining thereto, forever.

William Farrier, on October 21st, 1840, conveyed to John Jacob Lunan the 20 acres retained by him, and described it so as to leave 50 links off the north side, being the 50 links he had previously conveyed to Elias by the unregistered deed of January 18th, 1840.

In 1845 Lunan conveyed these 20 acres to Amelia Cross, who afterwards married one Ganton, and in 1854 the Gantons conveyed to the defendant, but as these latter deeds have not been left with me I do not know if anything can be gathered from them that would affect the case.

The defendant denies notice of the unregistered deed from Elias Farrier to Robert Croft of the strip for a road, of July 3rd, 1848.

I am rather inclined to doubt the truth of this denial of

notice by the defendant, but as on other grounds I think the plaintiff entitled to succeed, it is not necessary to examine the evidence on the question.

There was a way of necessity vested in Benjamin and the owners of the east half so soon as the land was divided by Benjamin and William. Some of the cases seem to consider that this gave a right to the owners of the east half to go over any part of the west half at their pleasure, but the better opinion seems to be that it is confined to a definite way to be determined by the agreement of the parties, or by the owner of the servient tenement, or by the owner of the dominant tenement, on default of the other: *Field v. Bannister*, 8 Gr. 257; *Chase v. Perry*, 26 Albany Law Journ. 413.

Changing the locality of the way from time to time by the agreement of the respective owners does not destroy the right, nor can the grant of a certain specific line for the road put an end to the right, in case a purchaser should buy without notice of the grant. That the defendant had notice of the existence of an actual travelled way is established by overwhelming evidence, and if not otherwise aware of the right, this must be taken to affect him with knowledge of the origin as well as existence of the right.

The evidence proves satisfactorily that the track laid off on the north side of the west 50 acres has been used by the owners of the east 50 acres for more than thirty years. It would be tedious to go over all the evidence on the matter, but the witnesses, Robert Croft, Button, Lunan and his wife, Scott, Foote, and Mrs. R. J. Croft give clear and to my mind sufficient evidence of the existence and almost daily use of the way by the owner of the east 50 acres for more than thirty years.

The defendant endeavored to prove by his sons that R. J. Croft had paid rent for the use of the road. I do not credit their evidence. Indeed, one of them swears to such a payment at a time when it is shown that R. J. Croft was dead. To establish such an acknowledgment of title with

a person now dead would require very clear and very reliable testimony. The witnesses to it are the sons of the defendant, and I was not favorably impressed with the way they gave their testimony.

The defendant also gave evidence to prove that Wm. Dixon, the son of the plaintiff, and who is a tenant to his father of the land, assisted in putting up the gate now complained of as an obstruction, and that the plaintiff himself had applied to purchase a road out from the defendant or one of his sons. Any act of Wm. Dixon without the knowledge or sanction of his father could only affect his interest as tenant, and would not prejudice the plaintiff the reversioner. But Wm. Dixon denies positively that he ever made any application to purchase a way out. I give credit to the plaintiff and his witnesses.

The deed from Benjamin Farrier to Robert Croft granted, as I have said, all ways, &c., appertaining to the premises or therewith used and enjoyed, in the ordinary long form then in use. The deed from Robert Croft to Robert James Croft is in the short form, which as extended in the statute, covers all ways, &c., used or enjoyed with the premises. The deed from R. J. Croft to the plaintiff is also in the short form.

The general words of those conveyances, even if the way were not one of necessity, would pass this right of way, as they include ways "therewith used and enjoyed." *Langley v. Hammond*, L. R. 3 Ex. 161; *Watts v. Kelson*, L. R. 6 Ch. 166; *Kay v. Oxley*, L. R. 10 Q. B. 360.

These words were wanting in *Brett v. Clowser*, L. R. 5 C. P. D. 376, and it was upon the omission of them that the decision of the case was rested. But no such words are required in the case of a way of necessity. Denman, J., says that *Worthington v. Gimson*, 2 E. & E. 618; *Pearson v. Spencer*, 1 B. & S. 571, and *Wheeldon v. Burrowes*, L. R. 12 Ch. D. 31 determine that, except in case of a way of necessity, in the absence of any reservation, no right to use ways which have been used and enjoyed in fact passes to a grantee of the land, unless there be something in the

conveyance to shew an intention to create the right to use the way *de novo*.

In the present case, therefore, whether considered as a way used and enjoyed with the land, or as a way of necessity, the plaintiff is entitled.

I think the plaintiff entitled to the relief he asks—a declaration that he is entitled to the use of the roadway in common with all persons justly claiming under William Farrier any part of the 50 acres, and to an injunction restraining the obstruction of it, and to the costs of suit.

A. H. F. L.

plaintiffs' title than those alleged to have been already done by them in the plaintiffs' statement of claim; costs and general relief.

By their statement of claim the plaintiffs alleged that at the time of the wrongful acts thereafter mentioned they were and at the time of making this statement still were the owners in fee of certain lands in the city of Toronto: that they had caused the said land to be subdivided into city and villa lots of dimensions to suit purchasers, and had advertised such lots for sale, and were endeavouring to make sale thereof to persons desirous of purchasing the same: that on June 7th, 1882, the defendants H. E. Caston and George A. Shaw presented to the defendant Charles Lindsey, the registrar of the city of Toronto, a document in the words and figures following:

"Know all men by these presents that I, George Alexander Shaw, of the City of Toronto, esquire, do hereby declare that I claim the lands and premises known and described as follows:" (being the said lands above referred to) "or some estate, right, title, or interest therein; and upon the decease of George Shaw, a lunatic, proceedings if necessary will be instituted to assert and establish my title and claim thereto; and all persons are hereby notified and cautioned against dealing with the said property or any part thereof, and any person or persons committing waste or damage to said lands and premises will be held responsible therefor, and damages claimed accordingly. As witness my hand and seal at Toronto, this 5th day of June, A.D. 1882.

[Signed] Geo. A. Shaw. [Seal.]

Signed, sealed and delivered

in presence of

[Signed] CLAUDE F. BOULTON."

and requested the defendant Charles Lindsey to register the said document in the registry office of the said city against the said lands, and the said document was registered on June 7th, 1882, as appeared by the books in the said registry.

The statement then went on to allege: (4) The said instrument was drawn up and prepared by the defendant H. E. Caston, who is a solicitor of this Court, and was executed by the defendant George A. Shaw, maliciously and with design and for the purpose of slandering, casting

doubts upon, and injuring the plaintiffs' title to the said lands, and of preventing them from making sales or otherwise dealing with the said lands, and it was in furtherance of the said malicious design and purpose that they caused the said document to be registered against the title to the said lands. (5) The defendant Charles Lindsey carelessly and negligently, without any warrant or authority in law, received and registered the said document, and by such conduct on his part the defendants H.E. Caston and George A. Shaw were enabled to execute their said design and purpose.

The plaintiffs then alleged that in consequence of such registration they had lost many purchasers, and were then unable to make sale of the said lands, "the registration of the said document operating as a cloud upon the plaintiffs' title to the said lands, and preventing and deterring intending purchasers from dealing with the plaintiffs in respect thereof, and unless the registration of the said document be cancelled the said lands will be rendered wholly useless to the plaintiffs:" that the defendants had neglected and refused to cancel the said document, though frequently applied to by the plaintiffs: that the defendants H. E. Caston and George A. Shaw threatened other acts of injury to and slander of the plaintiffs' title to the said lands. And the plaintiffs claimed as above stated.

The defendant Lindsey, by his statement of defence, alleged that the grievances complained of were committed by him after the passing of R. S. O. ch. 73, and when fulfilling a public duty as registrar, as aforesaid, and in the performance of such duty and not otherwise, and that one month's notice of action had not been given him pursuant to the said statute: that he registered the document referred to without malice, and *bond fide* believing it to be an instrument capable of being registered, as he had reasonable and probable cause for doing, and in no way desiring to injure the plaintiffs, or assist the other defendants in their alleged wrongful act, and he claimed the same benefit as though he had demurred: that he had no power to

cancel the registration of the said instrument after receipt by him, and that the action should be dismissed against him, with costs.

The defendant H. E. Caston, by his statement of defence, alleged that at the time of the execution of the said document he was solicitor for the defendant George A. Shaw; that the said George A. Shaw was the only son and heir apparent of one George Shaw, who had for many years been confined as a lunatic in the provincial lunatic asylum: that some months before the execution and registration of the said document the said G. A. Shaw consulted him, his solicitor, with regard to the said lands, and he instructed him that he claimed to be entitled to the said property upon the death of his father, the said George Shaw, and he declared that as soon as he could raise the necessary funds he would take legal proceedings for the purpose having it declared that the said property therein was vested in the said G. A. Shaw, notwithstanding certain conveyances thereof which had been made by certain parties claiming to be entitled to the said property under certain decree of foreclosure; and he furthermore instructed him, H. E. Caston, that the plaintiffs were negotiating for the purchase of the said property: that pursuant to instructions then received by the defendant H. E. Caston, from the defendant G. A. Shaw, and before the plaintiffs had carried out their said intended purchase, the plaintiffs were duly notified of the claims to the said property set up by the defendant G. A. Shaw, as the heir apparent of the said lunatic, and were made fully aware of his intention to protect his interests therein, but, notwithstanding this notice, the plaintiffs proceeded to complete their said purchase and to subdivide the said land: that the defendant G. A. Shaw subsequently, finding that the plaintiffs had paid no attention to the said notice, but, on the contrary, were offering the property for sale, again consulted him, H. E. Caston, as to how it would be possible to prevent the said lunatic's estate from passing into the hands of innocent persons for value without notice of his said claims: that

thereupon he, acting in entire good faith and wholly as the solicitor of the defendant Shaw, and without any malice whatever, drew up the document set forth in the said statement of claim, and the defendant G. A. Shaw approved the same, and it was duly executed by him and registered by his instructions, without malice or evil design, but wholly for the purpose of preserving, if possible, his *bond fide* claims to the said property: that the document in question was capable of registration, and the registration thereof ought not to be cancelled or interfered with in any manner. And he prayed to be dismissed, with his costs of defence.

The defendant George A. Shaw, by his statement of defence, stated that prior to 1850 the lands mentioned in the statement of claims were owned and occupied by his father, George Shaw. He then set out an account of the dealings with the said lands since his said father became a lunatic, in 1848, whereby the said lands were ultimately foreclosed and sold, which are sufficiently referred to in the judgment. He then alleged that feeling fully persuaded that under the circumstances before set out he had valid grounds for contending that the foreclosure and sale of the said lands which had taken place were null and void, and intending, on the death of his father, to institute proceedings for the recovery of the said estate, he consulted the defendant Caston, as his solicitor, prior to the purchase of the said lands by the plaintiffs, and caused them to be notified as in the defence of the defendant Caston alleged: that thereafter in order to prevent the said lands falling into the hands of a purchaser without notice, who might innocently purchase a defective title, he instructed the defendant Caston to draw and register a paper in order to notify such purchaser of the true position of matters, and accordingly a paper was in good faith drawn up, executed and registered, but not maliciously; and in executing the said instrument and instructing the Registrar as to the same, he acted in the utmost good faith, and in the *bond fide* intention of preserving his own and his father's interest in the

said property. Lastly, he submitted that the document in question was capable of registration, and the registration should not be cancelled or interfered with in any manner, and that he was justified in doing all he had done, and that the plaintiffs had not by their statement of claim made out any ground for the interference of the Court in the premises.

There were certain mortgagees of the property in question, who were not made parties to this action, viz., persons to whom the plaintiffs had given a mortgage on the property to secure the purchase money, on purchasing it. This mortgage was at the time of action brought in default.

The rest of the facts of the case sufficiently appear in the judgment.

The case was heard on November 8th, 13th, and 14th, 1882, at Toronto, before Proudfoot, J.

J. Bethune, Q. C., for the plaintiffs. As to the liability of the registrar, this is an invasion of the plaintiffs' legal rights, and it is not necessary to shew that the registrar acted maliciously, if the act was *extra vires* he is liable to an action independently of malice. See *Harrison v. Brega*, 20 U. C. R. 324; *Ross v. McLay*, 40 U. C. R. 83, 89; and R. S. O. ch. 73, ss. 1, 2, 20. The defendants *Casson* and *Shaw* are also liable, either on account of the damage resulting from the cloud on the title, or on the ground of slander of title. The paper registered does not allege an intention to appeal from the decisions in the former case of *Shaw v. Crawford*, 4 App. 371, which was commenced in 1877, heard on November 11th, 1878, and disposed of in appeal, 1879, and the time for further appeal, in which is gone, but it alleges an intention of instituting an independent proceeding. I also refer to *Bowles v. Stewart*, 1 Sch. & L. 209; *Kerr on Frauds*, 1st ed., p. 312.

W. Read, for the defendant *Lindsey*. The registrar is not liable unless the act was done maliciously, and without reasonable and probable cause. He is entitled to the

protection of R. S. O. ch. 73, s. 1. He, it is admitted, acted *bonâ fide*. I refer also to 35 Vic. ch. 27, O. If he thought he was acting in discharge of his duty, he will be protected, though he may not have exactly complied with the statute. If he had acted within the statute he would need no protection: *Ross v. McLay*, 40 U. C. R. 83. 87. As to the registration of the document, it was proper in the registrar to register in a case of doubt, and here there was doubt; and if the instrument does not affect lands, the plaintiffs have no case: *Drew v. The Earl of Norbury*, 3 Jo. & Lat. 267, 296. On the point of no notice of action having been given, I refer to *Mussey v. Johnson*, 12 East 67; and to *Wilkinson v. Hull*, 3 Bing. N. C. 508; *Doe dem McBernie v. Lundy*, 1 U. C. R. 186; and *Ashford v. McNaughton*, 11 U. C. R. 171; and to the definition of "instrument," in *Tomlinson's Law Dictionary*, and in *Webster's* and the *Imperial Dictionary*.

S. H. Blake, Q. C., for the defendants Caston and Shaw. A notice such as the one here may be registered: *Moore v. Culverham*. 27 Beav. 639; *Magrath v. Todd*, 26 U. C. R. 87; *Robson v. Waddell*, 24 U. C. R. 574. The defendant Caston is certainly not liable; he only acted as solicitor for Shaw: *Attwood v. Small*, 6 Cl. & Fin. 232, 352; *Marshall v. Sladden*, 7 Ha. 428, 442; *Barnes v. Addy*, L. R. 9 Ch. 244. The notice registered was merely a notice to the public that Shaw did not abandon his claim. There is no right to damages if there was a scintilla of right to do what was done, in the absence of malice: *Pitt v. Donovan*, 1 M. & S. 639; *Pater v. Baker*, 3 C. B. 831; *Smith v. Spooner*, 3 Taunt. 246; *Steward v. Young*, L. R. 5 C. P. 122; *Brulton v. Shields*, 3 U. C. R. 21; *Ashford v. Choute*, 20 C. P. 471; *King v. Patteson*, 4 B. & Ad. 9; *Starkie on Slander*, 3rd ed. 167; *Townshend on Slander and Libel*, 3rd ed., p. 336, 338, 342-7; *Cook's Law of Defamation*, p. 22, 35; *Folkard's Law of Slander and Libel*, 127. Your Lordship cannot remove this paper from the registry, and therefore you are asked merely to reiterate the decree of the Court of Appeal in *Shaw v. Crawford*, 4 App. 371. More-

over, the mortgagees are necessary parties to this suit, for if not successful it might impair the value of their security. Possession, too, is not sufficient *prima facie* evidence of title in a case like this. I also refer to *Graham v. Chalmers*, 2 L. J. N. S. 269; *Robson v. Carpenter*, 11 Gr. 293; *Hurd v. Billington*, 6 Gr. 145; *Buchanan v. Campbell*, 14 Gr. 163.

A. C. Galt, on same side. The case of *Shaw v. Crawford*, out of which this action has arisen, may be appealed at any time to the Privy Council; for the rule requiring a party to appeal within a year is purely discretionary, and appeals have there been entertained, even in *forma pauperis*, after a much longer lapse of time than has occurred here: *St. Louis v. St. Louis*, 1 Moo. P. C. C. 143; *Sree Mutty Bissnosoodery Dabee v. Rajah Burrodacaunt Roy*, 3 Moo. P. C. C. 11; *In re Surchet*, 10 Moo. P. C. C. 533; *D'Orliac v. D'Orliac*, 4 Moo. P. C. C. 374; *Brouard v. Dumaresque*, 3 Moo. P. C. C. 457. The documents put in in *Shaw v. Crawford* shewed that the appointment of the committee of the lunatic depended upon conditions which were not performed, and particularly that no security was ever perfected by the proposed committee, without which the appointment was invalid: *Re Rutter*, 1 W. R. 27; *Elme* on Lunacy, 5th ed. 49. Gen. Orders 38, sections 1 and 2. *Re Frank*, 2 Russ. 450. The *bona fides* of the defendants having been proved, no damages are recoverable: *Starkie* on Slander, 3rd ed. p. 163 *et seq.*; *Townshend* on Slander, 3rd ed., p. 336 *et seq.*

J. Bethune, Q. C., in reply. As to the limit of the time for appealing, see *MacQueen* on the Practice of the House of Lords, p. 694, 757; R. S. O. ch. 38, sec. 49. The *St. Louis* case was determined under the Quebec statute which was different: *Lattey's Privy Council Practice*, 1. The recovery of judgment in a suit for foreclosure the time from which the statute runs. The case of *Trust and Loan Company v. Shaw* was completed on October 2nd, 1868, when the final order of foreclosure was obtained and in 1869 the legal estate under the prior mortgage was

Got in. Even if Shaw was not served, it would be no objection: *McLean v. Grant*, 20 Gr. 76; *Gunn v. Doble*, 15 Gr. 655. Again, prior lunacy is no objection: *Rob. and Jos. Digest*, 2180-2. Then the improbability of ever getting leave to appeal from the unanimous judgment of the Court and of the Court of Appeal is very great: *The President and Members of the Orphan Board v. VanReenen*, 1 Knapp P. C. 83; *Tarring's Law* relating to Colonies, 170. The paper objected to here was put on record to prevent purchasers buying: it does not express any intention of appealing, but an intention of instituting new proceedings, neither does it state the title under which the defendant Shaw is going to claim, it might be an independent title. As to the defendant Shaw, he was a primary actor, and personally required the document to be registered; and, as regards the defendant Caston, in torts an attorney is as liable as a principal. Again, the instrument is not a registrable document: R. S. O. ch. 3, sec. 2, sub-sec. 1. As to the removal of clouds on title by the Court, see *Dynes v. Bales*, 25 Gr. 593; *Matthews v. Cragg*, 38 U. C. R. 319; *Matthews v. Walker*, 26 C. P. 67; *Rob. and Jos. Dig.* 3408-9. As to Slander of Title, I refer to *Cooley on Torts*, 221; and as to its not being necessary to make the mortgagees parties, to the Judicature Act, sec. 17, sub-sec. 5 (*MacLennan's Ann. ed.* p. 19).

February 9th, 1883. PROUDFOOT, J.—The action is brought against Mr. Lindsey, the Registrar of the city of Toronto, and George A. Shaw and Mr. Caston his solicitor, for registering and causing to be registered, on June 7th, 1882, a paper stating that George A. Shaw declared that he claimed certain land, of which the plaintiffs are the owners, or some estate, right, title, or interest therein, and upon the demise of his father, George Shaw, a lunatic, proceedings if necessary would be instituted to assert and establish his title and claim thereto, and all persons were notified against dealing with the property.

The claim against the Registrar is stated to be that he

carelessly and negligently and without any warrant or authority in law received and registered that document.

As to the other two defendants it is alleged that the instrument was drawn up and prepared by Mr. Caston, a solicitor of this Court, and was executed by Mr. Shaw maliciously, and with the design and for the purpose of slandering and casting doubts upon and injuring the plaintiffs' title to the land, and preventing them from making sales and otherwise dealing with the land, and that in furtherance of that purpose, he caused it to be registered.

From the evidence given there is no doubt this paper was prepared and registered for the purpose of preventing the plaintiffs dealing with the land; and Mr. Shaw in the proceeding acted for the purpose of asserting a supposed title to the property.

I do not think that this is such an instrument as ought to have been placed upon the register. The Registry Act, R.S.O., c. 111, s. 2, sub-s. 1, in defining the instruments that may be registered, after specifying a number which clearly do not include such a paper as this, concludes thus, "and every other instrument whereby lands may be transferred, disposed of, charged, incumbered or affected in any wise, in law or in equity, affecting land in Ontario." This paper must come under this category, if under any. It is not an instrument transferring, disposing of, charging or incumbering the land. Is it any one affecting in any way, in law or in equity, the land? Affecting lands must mean by the direct force of the instrument, in some way similar to the previous words made use of, as transferring, &c. This paper does not profess to affect the lands. It is a mere notice that if the claimant should survive his father he might then take proceedings to assert a title. He has no title at present, and may never have one; he may not survive his father, or his father may entirely recover, or may have a lucid interval, and make a will devising the land to other than the plaintiff. And if he should survive his father there is no certainty that he would seek to enforce his claim. It never could have been intended that

he register was to contain a record of such claims as his.

With regard to Mr. Lindsey, however, his liability does not depend upon the fact whether such a paper should be recorded or not. The R. S. O., c. 73, s. 1, appears to me to extend to registrars. It provides that every action brought against any officer or person fulfilling any public duty for anything done by him in the performance of such public duty shall be an action on the case as for a tort, and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause. The declaration in this case contains no such allegation. It only charges him with carelessly and negligently acting in permitting the paper to be registered. If he had acted entirely within the limit of his powers he would have required no protection. But the statute intended to protect him in the honest discharge of what he assumed to be his duty, though he may have in some respect mistaken it. If he maliciously and without reasonable or probable cause did any act under color of his office he gets no protection. The *bona fides* of Mr. Lindsey was admitted, and it seems to me impossible to make him liable in this action, and a verdict must be entered for him, with costs.

Even without the protection of the Act, I do not think the facts in this case would warrant a verdict against him for carelessness and negligence. Although in my opinion the paper ought not to have been registered, it is a matter upon which different persons might arrive at another conclusion. Registrars are not in general professional men, and it is not to be expected that they are to take advice when any dubious instrument is presented to them for registry, whether it is such as contemplated by the registry law. Their position would be a hard one if they are in such a case to be responsible, either for not registering or for registering. I think Mr. Lindsey took a prudent course in registering it, and one that ought not to subject him to liability.

The case as to Shaw rests on different grounds. The action is for slandering title. An action of that kind is not for words spoken or written, but for damage sustained by reason of the speaking or publication: *Malachy v. Soper*, 3 Bing. N. C. 371. To maintain the action the statement must be false: *Guterole v. Mathers*, 1 M. & W. 495; and made *mala fide*, and the damage must result from it: *Brook v. Rowl*, 4 Ex. 521. This *mala fides* or malice may be either express or implied, and must go to defeat the plaintiff's title. If the allegations are made by a stranger who has no right to interfere, malice is presumed, and if he cannot shew the truth he is responsible in damages; if by a party interested and made *bona fide* to protect his own interest the legal presumption of malice is rebutted, and the plaintiff must then shew that there was no reasonable or probable ground for the statement. In *Pater v. Baker*, 3 C. B. 868, Maule, J., says, "Slander of title ordinarily means a statement of something *tending to cut down* the extent of title, which is injurious only if it is false. It is essential to give a cause of action that the statement should be false, that it should be malicious, not, as Lord Ellenborough observes in *Pitt v. Donovan*, 1 M. & S. 639, malicious in the worst sense, but with intent to injure the plaintiff. If the statement be true, if there really be the infirmity in the title that is suggested, no action will lie, however malicious the defendant's intention might be. The jury may infer malice from the absence of probable cause, but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice; neither does the existence of probable cause afford any answer to the action."

In this case there is no direct statement in the registered paper that the plaintiffs' title is defective, but it is a necessary implication, as it was a warning to purchasers that the lunatic had a title, and that his heir might assert a title derived from him at some future time. It was something *tending to cut down* the extent of title.

the statement false, and made without reasonable or

Probable cause? For I am willing to assume that Mr Shaw made it *bond fide* to protect his own interest.

On October 2nd, 1868, an order for foreclosure absolute was made in a suit brought by The Trust and Loan Company against the lunatic and his committee, upon a mortgage made by the lunatic on May 1st, 1855, by this committee to the Trust and Loan Company. This mortgage was approved of and allowed by the then Chancellor. On February 9th, 1869, the Trust and Loan Company sold and conveyed the property in question to John Crawford. The present committee of the lunatic filed a bill in his name in November, 1877, against the representatives of Mr. Crawford and the Trust and Loan Company, alleging that the mortgage made by the former committee was invalid, because the sureties for the committee had not been given, and asking leave to be let in to redeem the property. And such proceedings were had that upon November 11th, 1878, the late Chancellor made a decree dismissing the plaintiff's bill. This decree or order was appealed to the Court of Appeal, where it was affirmed by the unanimous judgment of the Judges, in June, 1879. In the following month an application to enlarge the time for appealing to a higher Court was refused, and three years afterwards this paper is placed on record.

For the purpose of this suit I must assume that decree to be final and conclusive, and the Court of Appeal in declaring the case of the plaintiff of being able to open the foreclosure to be hopeless, (4 App. 390,) is a sufficient indication to me how useless it would be to treat it as yet hopeful. And, indeed, so long as *Gunn v. Doble*, 15 Gr. 655, and *McLean v. Grant*, 20 Gr. 76, remain unreversed, I do not see what other conclusion could be arrived at. But these cases have been approved of in the Court of Appeal: 4 App. 385.

It was argued, however, that the Court of Appeal had not paid sufficient attention to the form of the order appointing the committee, and that some evidence the

plaintiff offered was rejected. It is possible this may be so, but how can I determine the amount of attention that ought to be given to facts and arguments in the Appellate Court, or whether the evidence was properly refused. Both matters were presented to that Court for their consideration, and the Court considered them and adjudicated upon them adversely to the claim now set up. It is not as if these matters had been omitted in the judgments of the Appellate Court, nor as if it were new evidence that was sought to be introduced. The matters were discussed, and the evidence was then in existence and was rejected. And so with regard to the charge of notice to the Trust and Loan Company and the Crawford estate, the question was investigated by the Court of Appeal and pronounced upon.

I think upon this short ground that I must conclude that the lunatic has no longer any title to the land, and that the implied assertion that he has is untrue, and made without reasonable or probable cause, and, therefore, that the defendant George A. Shaw is liable in damages for placing or causing it to be placed on record. The evidence is clear that the object contemplated by the paper has been attained, and purchasers have been frightened from entering into and from completing contracts of purchase. It is not material that the plaintiffs might have compelled performance of contracts actually signed. The necessity for a suit in each case for that purpose would create an equity to have this blot wiped out. And when it has been the means of preventing purchasers from signing, and thus preventing the plaintiffs from having a remedy against them, its removal is more imperiously called for.

That it is a cloud upon the title is sufficiently proved from its effect. And that the Court has jurisdiction in such a case to give relief is decided in *Dynes v. Bale*, 25 Gr. 593, and the order in that case will be the form for the order here—a declaration that the lunatic George Shaw and George A. Shaw have no title to or interest in the

ds, and declare the notice and the registration thereof to be a cloud on the plaintiffs' title, and that the registration thereof be vacated.

In regard to Mr. Caston, it is clear on the evidence that he advised the step that was taken, and prepared the paper which procured its registration. The rule is well known, that in cases of breaches of trust, where any charge of fraud in connection with the transaction is made in which a solicitor participated, he may properly be made a party, even if the circumstances warrant no other decree against him, he might be made liable for costs: *Story on Equity Judgments*, sec. 232. No doubt the Court discourages making solicitors parties where no other decree can be made against them than perhaps a liability for costs. And to this effect are the cases referred to of *Attwood v. Small*, 6 Cl. & F. 232, and *Barnes v. Addy*, L. R. 9 Chy. 244.

But if any other decree ought to be made against him there is no reason for this qualification.

It has been seen that if a stranger who has no interest commits a wrong by which a person is injured, such as a fraud of title, if the statement be untrue malice is implied and he is answerable in damages. The rule being that an agent is personally liable to third parties for doing something which he ought not to have done: (*Evans Law of Principal and Agent*, 328), it is quite immaterial to the third party whether the offenders are as between themselves client and solicitor, or occupy any other of the numerous characters to which the principle of agency applies. To the third party he is not a solicitor, he is merely a wrongdoer, a *tort-feasor*. As to torts the principle of agency does not apply; each wrongdoer is a principal. This has been expressed by saying that the law does not recognize the relation of principal and agent as existing amongst wrongdoers: *Irland v. Milton*, 5 Hare 469.

Slander of title is a wrong. All persons procuring procuring, aiding, or assisting in the commission of a trespass, or any other wrongful act, are principals in the transaction: *Bates v. Pilling*, 6 B. & C. 38; *Stephens v*

Elwall, 4 M. & S. 261; *Perkins v. Smith*, 1 Wils. 328.

common instance is where an arrest has been made under process, which is afterwards set aside for irregularity, but the attorney who sued out the process and the client who set the attorney in motion may be sued for the assault and false imprisonment: *Parsons v. Lloyd*, 2 W. Bl. 844.

These authorities would justify treating Mr. Caston as a stranger doing a wrong to the plaintiffs without having any interest, but it is not of much importance here whether I look upon him in that character, or as in the same position as Mr. Shaw, for as there was not in my opinion any reasonable or probable cause for the impeachment of the plaintiff's title, he is equally liable as if the act were done with express malice.

It was objected, however, that the mortgagees ought to be parties, but this, I think, is not well founded. The cases contemplated by Judicature Act sec. 17 sub-sec. 5 refer to the rights of mortgagors in possession of lands with the consent of the mortgagees, and to remedies to protect these rights, the receipt of rents and maintenance in possession, &c.

But rule 103 is of much wider application, and enables the Court to deal with the interests of the parties actually before the Court, notwithstanding any misjoinder of parties, and misjoinder includes non-joinder it seems: *MacLennan's* Jud. Act, 153.

Torts affecting a number of persons give a substantive cause of action to each, when, as in this case, the tort does not arise out of contract, and does not affect persons in partnership in regard to their partnership business. The plaintiffs here sustain a substantive and independent injury with which the mortgagees have nothing to do, and there is no reason why they should be delayed in enforcing their remedies by requiring the mortgagees to assert a claim for a distinct wrong suffered by them: *Barrett v. Collins*, 10 Moo. 46.

The judgment will, therefore, be as I have indicated above, making Mr. Shaw and Mr. Caston liable for

damages, an inquiry as to the amount of the damage to be made by the Master, with costs to the hearing. Subsequent costs to follow the result of the account. (a)

A. H. F. L.

[CHANCERY DIVISION.]

CHARLTON V. WATSON ET AL.

Municipal corporation—Tax sale where no taxes really in arrear—Mistake—Cancellation of tax deed—Notice—Parties—Remedy over against person not party—R. S. O. ch. 180, sec. 165.

The plaintiff was owner in fee of certain lands which were conveyed to him by deed of July 27th, 1868, registered August 11th, 1868. Subsequently, by mistake, the said lands were sold for taxes, although no taxes were actually in arrear; and by deed of March 11th, 1880, were conveyed to A. McL., the tax purchaser, which deed was registered May 18th, 1880. On November 29th, 1881, A. McL., conveyed the said lands to J. W. by deed absolute in form, but intended as security for money advanced by J. W., which deed was registered December 1st, 1881. The plaintiff found out that this sale for taxes had taken place shortly before bringing this action, in which he sought the cancellation of the deeds to McL., and J. W.

Held, that the plaintiff was entitled to have the deeds cancelled, and J. W. was entitled to judgment against A. McL., for the moneys advanced by him.

Held, also, that the fact that the defendants might have a remedy over against the municipal corporation which had sold the land for taxes, did not make the corporation a necessary party to this action.

Held, also, that R. S. O. ch. 180, sec. 165, does not apply in a case where there have been no taxes in arrear at the time of the sale of the land for taxes.

THIS was an action brought by one John Charlton, seeking to have a sale of certain lands for taxes declared illegal and void, and certain deeds declared to be a cloud on his title to the said lands, and ordered to be delivered up to be cancelled.

The writ of summons was issued on October 13th, 1882. The defendants were James Watson, by original writ, and Archibald McLellan, added as a party defendant, by order in Chambers, made on the application of the plaintiff after the delivery of the statement of defence.

(a) The action having been afterwards transferred to the Queen's Bench Division, and there heard by way of appeal from the above judgment, the decree was varied by ordering judgment against the defendants for nominal damages, with costs as against the defendant Lindsey, with costs against the other defendants. See the Report 3 O. R. 66.

In his statement of claim the plaintiff alleged that about July 27th, 1868, one W. Strachan, being owner in fee of certain lands, conveyed the same in fee to him for valuable consideration by deed of that date, duly registered on August 11th, 1868; and he had ever since been the owner and in occupation of the same: that shortly before the issue of the writ herein he ascertained the fact that all the said land, except ten acres, was sold for taxes alleged to be due on all the said land for the year 1878, to the above named Archibald McLellan, who on May 18th, 1880, caused to be registered in the proper office what purported to be an indenture, dated March 11th, 1880, and made between one Findlay McRae, the then warden of the county of Grey, and one Stephen Parker, whereby the said warden assumed to convey the said last mentioned lands being the lands in question, to the said McLellan, for \$3.10 as and for arrears of taxes alleged to be due on all the said first mentioned lands up to January 8th, 1878, together with costs: that the said McLellan by deed of November 29th, 1881, assumed to convey the lands in question to the defendant James Watson, which deed was registered on December 1st, 1881, which deed Watson claimed, though absolute in form, was given and accepted merely as security for moneys advanced by him by way of loan to the said McLellan, in whom the equity of redemption remained: that at the time of the sale to McLellan and of the execution and registry of the deed to him, there were no taxes due or in arrear on the said lands as alleged. but on the contrary all taxes of every nature and kind whatsoever assessed against the said lands were punctually paid by him, the plaintiff, when due and payable, and that he held a receipt from the proper officer for the taxes for which his land was sold as aforesaid: that the registration of the deed to McLellan and to Watson were a cloud on his title to the lands in question, which cloud Watson had refused to remove, asserting himself to be the owner of the lands; and he claimed that the said sale for taxes might be declared illegal and void: that the deeds to

McLellan and Watson might be declared to be a cloud on his, the plaintiff's, title to the lands in question, and might be delivered up to be cancelled and the registration vacated: that if the equity of redemption in the said lands should be found by the Court to be still outstanding in the said McLellan, that the said McLellan might be ordered to release the same, or his equity of redemption therein might be foreclosed; for all proper directions, and further relief.

By his statement of defence, the defendant Watson alleged that it was not until a short time before the commencement of this action that he knew the plaintiff made any claim to the land in question: that about November 29th, 1881, the defendant McLellan applied to him for a loan of \$200 on the said land, of which he claimed ownership: that he examined the title in the proper registry books and found the deed of March 11th, 1880, above mentioned: that he accordingly advanced the \$200, and took the conveyance of November 29th, 1881, which though absolute in form was intended merely as a security for the said loan: that in April, 1882, he made a further advance to McLellan of \$400 on the same security, before receiving notice from the plaintiff that he made any claim to the land: that a sum of \$600 was now due to him in respect of the said loans: that the plaintiff had notice of the claim of McLellan prior to the deed to himself, the defendant Watson, and acquiesced in the same and enabled him to use the said land as his own property, for the purpose of obtaining loans as aforesaid, and he claimed the protection of the Court as a purchaser for value without notice; that he was willing to be redeemed, and to convey the land to the plaintiff on payment of the said \$600; without which payment the plaintiff's *laches* and acquiescence disentitled him to relief: that he claimed title as aforesaid under the said municipality of the county of Grey, and was entitled to be indemnified by them in case the plaintiff succeeded in this suit, and submitted the said municipality was a necessary party to this action, and that

Watson, was in any event entitled to be indemnified by McLellan against the claim of the plaintiff in this action, and against the costs thereof, and he prayed the same by way of cross-relief against the said McLellan. The defendant McLellan did not deliver any defence.

The case was heard at Owen Sound, on April 6th, 1883, before Ferguson, J.

D. A. Creason, for the plaintiff. The plaintiff is properly in Court with proper parties, and the evidence is conclusive that no taxes are in arrear. The defendant Watson was put on enquiry, and had full time to make enquiries, but did not make them. I refer to *Aston v. Innis*, 26 Gr. 42; *Silverthorne v. Campbell*, 24 Gr. 17; *Knaggs v. Ledyard*, 12 Gr. 320; *Bamberger v. McKay*, 15 Gr. 328; *Irwin v. Harrington*, 12 Gr. 179; *Mills v. McKay*, 14 Gr. 602, 15 Gr. 192; *Austin v. The Corporation of the County of Simco*, 22 U. C. R. 73; *Black v. Harrington*, 12 Gr. 175; *Smit v. Redford*, 12 Gr. 316.

D. Black, for the defendant Watson. The corporation should be a party, because they received the defendant money, \$3.19, being 50c. and costs, and in the case of the plaintiff's success the defendants might have a remedy over against them; *Shaw v. Ledyard*, 12 Gr. 382; *Our case* falls within sec. 165 of the Assessment Act, R. S. O. ch. 180; and there was no "occupation" here within the meaning of sec. 167 of that Act: *Bank of Toronto v. Fanning*, 17 Gr. 514, 18 Gr. 391. I also refer to *The Municipality of Berlin v. Grange*, 1 E. & A. 279, 284; *Warne v. Coulter*, 25 U. C. R. 177. The plaintiff was not technically right when he commenced the action, and there should be no costs; and this defendant should have a lien over for \$3.19, &c., and he is also entitled to judgment against McLellan for the amount of the advances.

At the close of the argument the learned Judge gave judgment declaring the tax sale bad, but reserved judgment as to the other points.

The effect of the evidence adduced sufficiently appears in the judgment.

April 5th, 1883. FERGUSON, J.—At the close of the argument I found upon the evidence that there were not at the time of the sale for alleged arrears of taxes any unpaid taxes upon the land sold. The evidence to shew this was abundant. It was made quite clear that the taxes for which the lands had been sold were paid at the proper time, and that the sale took place by reason or in consequence of what was clearly shewn to be a mistake.

As to the objection that the corporation of the county of Grey should have been a party to the suit, on the ground that the defendants, in case of the success of the plaintiff, would have a remedy over against them, I am, after looking the authorities referred to by counsel, of the opinion that the corporation was not a necessary party to the action.

It was argued that the defendant Watson had a lien upon the land for the amount paid by the defendant McLellan, through whom he claimed, for fifty cents taxes and costs, making in all, \$3.19, and that this sum had not been tendered before action, and section 165 of the Assessment Act (a) was relied on in support of the argument. This section is the same as 33 Vic. ch. 13, sec. 13, and I am of the opinion that the section does not apply in a case where there has been no arrears of taxes at the time of the sale. In such a case how can there be a "tax purchaser."

I cannot perceive that the ingenious arguments of counsel regarding the meaning to be attached to the "occupation" can affect the rights of the plaintiff here. I think the evidence of demand and tender of a conveyance sufficient. I am of the opinion that the plaintiff is entitled to judgment in his favour, and to have the cloud removed from off his title as he has asked, and to his costs of suit from the defendants. The defendant Watson is entitled to judgment

(a) R. S. O. ch. 180.

against the defendant McLellan for the whole amount that he advanced, \$600 and interest and his costs of suit, and upon payment of the plaintiff's costs of suit he will be entitled to add these to his claim against the defendant McLellan.

There is judgment accordingly.

A. H. F. L.



[CHANCERY DIVISION.]

SMITH V. THE MIDLAND RAILWAY COMPANY.

Sale of railway lands for taxes—Statute of Limitations—Assessment Act of 1869—32 Vic. ch. 36.

Under the Assessment Act of 1869, 32 Vic. ch. 36, the lands of railways might be sold for the non-payment of taxes. The Statute of Limitations does not begin to run against a tax purchaser, until the period of redemption has expired.

Where it appeared that, as far as the county treasurer was concerned, all the steps taken by him in regard to the sale were regular, and authorized by 32 Vic. ch. 36, and that the sale had taken place for taxes actually in arrear for the required length of time, followed by a tax deed thereafter, which had not been questioned within two years.

Held, that the sale and deed were not afterwards impeachable, although it was not clear on the evidence, whether the county clerk and the assessor had or had not properly complied with the requirements of secs. 111 and 112 of the said Act.

THIS was an action brought by Robert Charles Smith against the Midland Railway of Canada, claiming possession of certain land, being a portion of the defendants' railway, or an order for sale thereof, and payment of the value and interest to him; and claiming also \$100 for *mesne* profits since March 10th, 1874, costs of suit, and general relief.

The statement of claim set up that the defendants' railway ran through lot 4, concession 12 of the township of Smith, in the county of Peterborough: that on August 19th, 1872, the taxes upon that part of the railway running through the said lot for the year 1869 being in arrear, a warrant bearing that date was issued under the hand of

The warden, and under the seal of the said county, commanding the county treasurer to levy on that portion of the said lot for the said arrears of taxes with costs: that accordingly the treasurer, on December 5th, 1872, sold by public auction to one R. Lukey for \$5.37, on account of the said taxes and costs, a portion of the said railway running through the said lot, being the lands in question in this action: that on March 10th, 1874, in accordance with the Assessment Act, the said land not having been redeemed, the warden and treasurer of the said county, by deed of that date, conveyed the said land to Lukey; that on December 16th, 1874, Lukey conveyed the said land, so sold for taxes, to the plaintiff, his wife joining and barring her dower; and that the defendants retained possession of the said land and refused to give it up the same to the plaintiff, though he had demanded the same; and the plaintiff claimed as above stated.

By their statement of defence the defendants denied generally the allegations of the plaintiff's claim, and they set up that they were at the time of their said defence, and had been for fifteen years or more, through themselves or the persons through whom they claimed, in continuous and undisturbed possession of the land in question, and they claimed the benefit of Ont. Jud. Act, 1881, O. 15, Rule 20. They further said that no portion of the taxes on the said land was in arrear at the time of the alleged sale to Lukey, or for or in the third year, or for more than three years preceding 1872, when the warrant to levy was issued, and that the statement of claim did not allege that such taxes were so in arrear, as required by the Assessment Act, and they claimed the same benefit as though they had demurred: that the alleged sale to Lukey was irregular and invalid under the Assessment Act, among other respects in that it was improperly and insufficiently advertised, and not made in the manner prescribed by the said Act, and that at the time of the said sale the said treasurer failed to sell the said lands for the full amount of taxes thereon, and did not at such sale adjourn the same until a

day to be publicly named by him as required by the said Act, and that no estate passed to Lukey by the deed to him, and the plaintiff had no right to maintain this action: that the treasurer of the county of Peterborough did not furnish to the clerk of the municipality in which the lands were situate, any list of lands in the said municipality in respect of which taxes were in arrear for three years before February 1st, 1882, as required by the Assessment Act, nor were the said lands included in said list, if any was so furnished, and were therefore not liable to be sold for taxes: that even if the plaintiff or any one through whom he claimed was ever theretofore entitled to maintain an ejectment for the land in question, this action was not brought within ten years next after the time when the right to bring it first accrued to the plaintiff or the person through whom he claimed, and the plaintiff's right to bring this action was barred by R. S. O. ch. 108: that they were and for more than ten years before the commencement of this suit had been in possession of the land in question using the same for purposes of their railway, and that the said land was necessary for the said purposes and under the defendants' statutes was such as they had the right to take and have for the said purposes; and if the plaintiff had any interest in or right to the said land he was entitled to compensation therefor, but not as against the defendants to possession: that the said statutes provided for the fixing of the said compensation by arbitration, and the plaintiff's remedy was by that means, and not by a suit at law to recover possession and they claimed the same rights in this respect as though they had demurred: and lastly that at the time of the deed from Lukey to the plaintiff, they were and long before then had been in possession of the said land, claiming the same adversely to Lukey, and the alleged conveyance from Lukey was, under 32 Hen. VIII. ch. 9, sec. 2, 4, and 6, void and passed no title to the plaintiff.

The case was heard before Boyd, C., at the sittings of this Court at Peterborough, on April 6th, 1883.

It appeared that the lands in the statement of claim mentioned were placed on the collector's resident roll for 69, for \$2.69, described as, 12th concession, Cobourg and Peterborough R. W. Co., part lot 4, two acres.

In February, 1872, the usual return was made by the county treasurer to the township clerk of lands liable to be sold for taxes, including this land, but the township clerk's return of occupied lands did not contain this.

A warrant of the warden to levy was dated August 19th, 1872. The sale was published first in the *Examiner*, of Peterborough, on August 29th, and therein continuously on September 5th, 12th, 19th, and 26th; October 3rd, 10th, 17th, 24th, 31st; November 7th, 14th, 21st, 28th; and December 5th; in all, fifteen times and 100 days before sale, which took place on December 5th, 1872. The sale was

advertised in the *Ontario Gazette*, on October 19th, 26th, and November 2nd, and 9th. At the sale, one quarter of an acre, the land in question, was sold to Robert McKay. There was no enlargement of the sale. McKay executed his deed on March 10th, 1874. On December 10, 1874, by deed registered March 31st, 1875, he conveyed the land in question to the plaintiff.

The rest of the facts sufficiently appear from the judgment.

J. Ash, Q. C., for the plaintiff. The sale of the land is valid, and as the railway has no claim to any special privilege, the plaintiff is entitled to judgment.

J. Moss, Q. C., for the defendants. The tax sale is not properly proved. There is no proof that the municipality fixed the rate in respect of which the tax sale took place. That the land was occupied in 1872, and should have been included in the township clerk's return of occupied lands. That statutory requirements were not complied with: 32 Ch. 36, sec. 109, *et seq.* Besides the plaintiff is barred by Statute of Limitations: *Cotter v. Sutherland*, 18 C. P. 1; *McLaughlin v. Pyper*, 29 U. C. R. 526. I also refer to *McKay v. Cryslar*, 3 S. C. R. 436; *Fenton v. McWain*, J. C. R. 239; *The Corporation of the County of Welland*

v. *The Buffalo and Lake Huron R. W. Co.*, 30 U. C. R. 14 S. C. in App. 31 U. C. R. 539; *The Grand Trunk R. W. Co.* v. *The Credit Valley R. W. Co.*, 26 Gr. 572; *Starling The Grand Junction R. W. Co.*, 30 C. P. 247; *Slater The Canada Central R. W. Co.*, 25 Gr. 363.

Lash, Q. C., in reply. There was no such occupation by the defendants here as would bar the plaintiff, and any error of the assessor in respect of not returning the land in 1872 as occupied, is cured by 32 Vic. ch. 36, secs. 155 and 156. I refer also to sec. 113. Moreover, as regards the Statute of Limitations, the right of a tax purchaser depends entirely on statute before he gets his deed. The matter is in contract merely before that. See as to this 32 Vic. ch. 36, secs. 141 and 150.

April 28th, 1883. *BOYD, C.*—I retain the view expressed at the hearing, that the land of the railway may be sold for taxes. By the Assessment Act of 1869, 32 Vic. ch. 36, all the real estate of such companies is taxable—secs. 7, 8 (including the roadway), and the accrued taxes are declared to be a special lien on the land, having preference over any claim, lien, privilege, or incumbrance of any party except the Crown (sec. 107). In the case of an ordinary vendor's lien, the roadway of the company can be sold: *Wing v. Tottenham and Hampstead Junction R. W. Co.*, L. R. 3 Ch. 740, and in view of the English decisions, there is no impropriety in giving effect to the statutory lien for unpaid taxes by means of a sale of the land: *Munns v. Isle of Wight R. W. Co.*, L. R. 5 Ch., at p. 418.

So as to the Statute of Limitations, I still think that it did not begin to run against the plaintiff till the period for redemption had expired, and when he might have obtained his deed. In other words the statute did not commence to run from the date of the tax sale, and during the pendency of the certificate of sale; but only from the time when the right of redemption ceased. There is a qualified ownership during the year for redemption, to protect the property from spoliation and waste, under sec. 142; but

the estate is not vested in the purchaser till the execution of the deed. By analogy to *Pugh v. Heath*, L. R. 7 App. Cas. 235, a point of departure is given for the statute when the right to redeem is extinct and the title is vested in the purchaser (sec. 150). From this point of time ten years had not elapsed before the writ in this action was issued.

I reserved one point for consideration as to the validity of the tax sale. It is sufficiently proved that the county treasurer included the land in question in the list provided for by the 110th section of the Assessment Act, 32 Vic. c. 36. This was received by the township clerk, and a return was afterwards, in June, made by him to the treasurer of lands included therein which had become occupied. There is no evidence as to what was done with this list by the local officers, *i. e.*, the clerk and assessor. It is not shewn that it was kept on file in the office, or that it was delivered to the assessor, or that, if delivered, the assessor dealt therewith as provided by sections 111 and 112 of the Act. It may be that the assessor made default in the proper performance of his duty in not making a return of the land as occupied by the railway company, which appears to be the state of facts regarding the line of the road in 1869, from about May or June. But, on the other hand, it may be that the assessor made his inspection before these months, so that when he went his rounds there was no visible change in the aspect of the premises from that presented in former years, when the track was abandoned, and when the assessment was upon the land as non-resident (see sec. 7).

However the facts may be, it appears to be the intention of the Act not to vitiate a sale on account of the default of subordinate officers in observing statutory requirements. So far as the county treasurer is concerned, all the steps taken by him were regular and authorized by the Act. He prepared the special list of lands liable to be sold, and had no intimation by the return of occupied lands that the premises in question were exempt from immediate sale by virtue of sec. 131 of the Act. In these circumstances, a

sale having taken place for taxes actually in arrear for the required length of time, followed by a tax deed thereafter which has not been questioned within two years, I am of opinion that the sale and deed are not now impeachable for the default (if there be default) of the subordinate local officers in carrying out the special provisions of the Act above referred to. By effluxion of time the deed has become to all intents and purposes valid and binding (see ss. 130, 150 and 155). It has been decided under the curative clauses that when the sale has been openly and fairly conducted it will be final as against the objection that the land, though assessed as unoccupied, was in fact occupied: *The Bank of Toronto v. Fanning*, 18 Gr. 391. Section 117 of the Act, imposing penalties upon defaulting clerks and assessors who fail to carry out the statutory directions regarding the list of lands liable to be sold, affords suggestive evidence that this is the remedy intended by the Legislature, and not the avoiding of the tax sale and deed, at all events after two years.

Judgment for the plaintiff, with costs of action: but the execution of the judgment as to possession may be suspended for such reasonable time as will enable the company to take steps to expropriate this land.

Six months suspension, with leave to apply.

A. H. F. L.

[CHANCERY DIVISION.]

MITCHELL V. SYKES.

—Power to sell for repayment of advances without special authorisation—Irrevocable power—Power to sell by auction.

Manufacturer, desiring to borrow money from M., agreed with M. in writing, to have the selling of the goods manufactured at his, S.'s, factory; should give M. a mortgage on the factory, and premises to secure \$5000; to be advanced by M., and should furnish to M. all the goods manufactured at the factory, and manufacture the same to the satisfaction of M. to ship the same to M., as M. directed, at such times, and in such reasonable quantities as he from time to time should direct, and should pay M. a *del credere* commission of seven and a half per cent. for selling the same, and at eight per cent. on all moneys advanced by M. over the \$5000; and should, as his orders were filled, and the goods received, to advance in S. seventy-five per cent. of the wholesale trade value of such goods, and to purpose the said goods were to be invoiced to M. at such value that he, M., should sell them to the best advantage. It was agreed, also, that all goods manufactured at the factory shall be sold only by or through M. By the above agreement constituted M. a factor, not a pledgee, for he had to sell without regard to any default in payment, in the ordinary course of business.

So, that M.'s authority to sell was irrevocable. Further, that, under the interest which M. had in the goods, and from the nature of the dealings, and arrangements of S., and M., if S. did not repay the money made to him, or did not deliver to M. goods sufficient to keep his margin protected by a surplus of twenty-five per cent. of goods at the wholesale value, and it became necessary for M. to protect himself against such loss, and he could not within a reasonable time have sold to customers, he was to sell by auction, and was not bound to delay until private sales could be made.

It was held that certain goods not specially ordered by the plaintiff, were sent to the defendant on some arrangement, on which he advanced seventy-five per cent., and which goods were sold by him in the same manner as goods sent in pursuance of his orders.

It was held that he had the same right to sell these goods as the goods received under the written agreement.

This was an action brought by William Mitchell against John Sykes. The plaintiff was a commission merchant broker, residing and carrying on business in the City of Toronto. The defendant was a manufacturer of matting works at Cobourg.

In his statement of claim the plaintiff set out that the defendant being in want of money to carry on business, applied to him for monetary assistance, which the plaintiff refused to give him, and an agreement was entered into between them, dated November 11th, 1881, respecting the loan for the space of two years unless sooner terminated.

contents of this agreement are referred to at length in *the* in
 judgment.
 The plaintiff then referred to certain terms of the *the*
 agreement, and alleged that he advanced 75 per cent. *the*
 the wholesale trade value of all goods ordered from *the*
 the defendant as he agreed in the said agreement: that *the*
 the sum so advanced on goods ordered not being sufficient *the*
 the defendant from time to time consigned to the plaintiff *the*
 but not on his order) divers quantities of goods, such as the *the*
 manufactured, as security to the plaintiff for further *the*
 advances which the plaintiff made, and such advances *the*
 the aggregate amounted to about \$7,000; that the plaintiff *the*
 was willing to advance on the security of the goods 75 per *the*
 cent of the wholesale value thereof, and did so, but *the*
 said goods not being marketable, and not made to *the*
 satisfaction of the plaintiff, depreciated in value about *the*
 fourth of the value, so that the plaintiff's margin of security *the*
 was virtually gone, and he requested the defendant *the*
 send additional goods to cover the said margin, which *the*
 defendant refused to do: that the defendant asked per-
 mission to sell certain of the goods he was then manufac-
 turing, to which the plaintiff consented, but when he was
 found selling to parties retailing such goods, and so spoil-
 ing the plaintiff's business, and at prices much less than
 they were invoiced to the plaintiff, he, the plaintiff, with-
 drew his consent, but the defendant still persisted in sel-
 ling the said goods in the same manner, and refused to
 supply the plaintiff with sufficient goods to make up his
 margin to 25 per cent. more than he advanced on the said
 goods, or to furnish any more goods on the plaintiff's order
 at the wholesale trade value thereof, unless the plaintiff
 would continue to advance 75 per cent. on the wholes-
 ale trade value of all goods manufactured by the defend-
 ant, the defendant so refusing to furnish the said goods
 ordered, the plaintiff demanded repayment of all sum
 had advanced on goods other than those ordered, and
 the defendant refused to pay: that the defendant
 refused to desist from selling the said goods, although

bidden and notified, and requested to do so by the plaintiff: that the plaintiff, after making a demand of payment of the moneys advanced on goods consigned to him as a commission merchant, sold and disposed of the same by public auction for cash, of all of which the defendant had due notice: that the plaintiff, as was the agreement as well as the rule, paid certain moneys for insuring the said goods, and charged the defendant with certain fees for storage, and also interest at the rate aforesaid, and the commission on selling the said goods: that the defendant had refused to render any statement of the amount due to the plaintiff for commission on the goods sold by him which he agreed to pay the plaintiff. And the plaintiff claimed to have the said agreement terminated and cancelled, also to be paid the sum of \$6,280.89 and interest, being the balance due on such advances and charges as aforesaid, after deducting the sum of \$4863.44, the amount realised from the sale of the said goods.

In his statement of defence, the defendant admitted that he executed the agreement of November 11th, 1881, which he set out at length. He then denied the material allegations in the plaintiff's statement of claim, and as to that portion of it which alleged that the plaintiff after making a demand of payment of the moneys advanced on goods consigned to him as commission merchant, sold the same by public auction, the defendant said that by the said agreement the plaintiff was to advance 75 per cent. on the wholesale trade value of such goods as were invoiced to him at the wholesale trade value, and was to receive interest at the rate of 8 per cent. on all moneys he should, from time to time, advance over and above the amount of said loan, to be secured by mortgage, (see the agreement set out in the judgment) but that the plaintiff did not advance any sum over and above the amount secured by mortgage, or over and above the amount of 75 per cent. advanced on said goods, but that the plaintiff, instead of making such advances on goods as he agreed to do, for the purpose of raising money to make such advances,

and in violation of such agreement, wrongfully and unlawfully pledged a large portion of said goods to some third party, and did suffer the said goods to be sold by public auction on a few days' notice, and for cash, and said plaintiff did not sell the said balance of goods to the best advantage, as he in said agreement agreed to do, but allowed them to be sacrificed and sold much below their wholesale trade value, and the plaintiff had refused to disclose to the defendant the name of the party to whom the goods were pledged, or the amount for which they were so held, although repeatedly requested to do so: that he, the defendant, forbade the sale of the said goods so pledged as aforesaid by public auction, or otherwise than in accordance with said agreement, and demanded the release of the same from the said pledge as in violation of the said agreement: that the plaintiff refused to accept the goods of the defendant ordered by him at the regular prices of the wholesale trade value, and refused to advance 75 per cent of such wholesale trade value as by the said agreement was provided: that the said agreement was still in force, together with the terms and provisions thereof, and the plaintiff was not entitled to a rescission thereof by the Court, and the plaintiff could not now maintain this action, and he craved the same benefit of this objection as if he had demurred: that he, the defendant, had suffered great loss and damage by the plaintiff's breaches of the agreement, which agreement he the defendant then was and had always been willing to perform.

And the defendant counter-claimed for a balance alleged to be due to him on goods supplied by him to the plaintiff, in pursuance of the terms of the agreement, and for damages for breaches of the said agreement by the plaintiff.

The case was heard at Toronto before Wilson, C. J. P. D., on May 2nd, 1883.

John Bain, for the plaintiff, referred to *Pigot v. Cubley*, 15 C. B. N. S. 701; *Halliday v. Holgate*, L. R. 3 Ex. 299; *Donald v. Suckling*, L. R. 1 Q. B. 585; *Johnson v. Stear*, 15 C. B. N. S. 701.

G. H. Watson, for the defendant, referred to *Smart v. Sanders*, 3 C. B. 380, *S. C.* in App. 5 C. B. 882.

June 6th, 1883. WILSON, C. J. C. P. D.—I am of opinion the written agreement of November 11th, 1881, contains a full and perfect agreement between the parties. It recites that the defendant under the name of the Ontario Matting Company desired to carry on his business as manufacturer of cocoa-matting, and mats, and required for the purpose \$5,000 in money, which the plaintiff was willing to procure for him as a loan upon the security of a second mortgage on the factory and premises of the defendant for two years, and that the plaintiff was to have the selling of the goods manufactured at the factory.

The parties then agreed as follows: The defendant covenanted to give John Fiskien, as trustee for the plaintiff the second mortgage for the \$5,000 for two years at eight per cent. payable half yearly; and to furnish the plaintiff all the goods manufactured at the factory and to manufacture the same to the satisfaction of the plaintiff; and to ship the same to him as the plaintiff directed at such times, and in such reasonable quantities as he from time to time should direct, and to deliver the same to him at Toronto; and to pay the plaintiff a *del credere* commission of seven and a half per cent. for selling the same, and interest at eight per cent. on all moneys advanced from time to time by the plaintiff over and above the \$5,000, and a commission of five per cent. for the amount advanced on the mortgage for the first year and two and a half per cent. for the second year, to be payable in advance; and to give the plaintiff and one George Longmore the first refusal of purchasing the factory during the term of the mortgage at \$14,000.

The plaintiff covenanted to lend the \$5,000 for two years, and as his orders were filled and the goods received advance in cash to the defendant, "seventy-five per cent. of the wholesale trade value of such goods, and for that purpose the said goods are to be invoiced to him at

such value that he will sell the goods to the best advantage:" to render proper account of all goods sold every month, beginning with the first consignment: to sell for the seven and a half *del credere* commission: to keep the accounts of the defendant if required for six months from the date of the agreement gratuitously, provided he was not required to go out of Toronto for that purpose.

It was also mutually agreed between the parties that all the goods manufactured at the factory were to be sold only by or through the plaintiff: that the agreement was to be in force for two years, unless terminated by notice in writing, which either party might give in default of manufacturing for three months or of making such advances, such notice to be made by a month's notice in writing, and to be left at the usual place of business of the party, and that the mortgage should become payable at the time the agreement was terminated by either of the parties, although the two years had not expired.

By this agreement I understand the plaintiff, so far as this action is concerned, was not bound to do more than to procure for the defendant the loan of the \$5,000, and as the plaintiff's orders were filled and the goods were received by him to advance seventy-five per cent. of the wholesale trade value of such goods, and for that purpose the goods were to be invoiced to him at such value "that he will sell the goods to the best advantage." What was meant was that the goods should be invoiced at such prices that the plaintiff "will," *i. e.*, be enabled "to sell the goods to the best advantage."

The defendant on his part was bound to deliver to the plaintiff at Toronto all the goods he, the defendant, manufactured at the factory, and to send them to the plaintiff at such times, and in such reasonable quantities, as the plaintiff from time to time should direct.

There is not a word in the agreement binding the plaintiff to accept any other goods than those which he ordered, or to advance the 75 per cent. upon any other goods than upon those which he received in fulfilment of his orders.

It appears from the evidence that of the \$5,000 lent to the defendant, about the sum of \$3,000 was required by him for the purchase of stock and procuring men and paying wages. And it also appears the \$3,000 was not sufficient for these purposes, and when that sum was expended that further advances or loans were made by the plaintiff to the defendant to enable him to purchase stock and to pay wages; and that goods, not in filling the plaintiff's orders, that is, not required for present customers, were sent by the defendant to the plaintiff upon an agreement or arrangement of some kind by which the plaintiff was to make advances, and upon which he did advance 75 per cent., and which goods he had the right to sell, and did sell as opportunity offered, just the same as the goods which were sent to him upon orders, or to fill orders.

The effect of such arrangement and course of dealing, so long as it continued, for it was certainly not binding either upon the plaintiff or the defendant longer than they respectively pleased, was to constitute the plaintiff a *factor* for the sale of these goods upon the like terms he was selling those which he ordered from the defendant, or to constitute the plaintiff a *pledgee* of the goods.

I think it was to constitute the plaintiff a *factor*, for he had power to sell without regard to any default or payment in the ordinary course of trade.

Assuming the plaintiff to have been acting as a factor, as I think he was with respect to the goods sent for special advances, that is, just to fill orders, the question is, had he, under the circumstances of this case, the power to sell for repayment of his advances of his own motion without being specially authorized to do so? A factor, it is decided, cannot sell to reimburse himself for advances against the will of his principal: *Smart v. Sandars*, 5 C. B. 895, in *Graham v. Dyster*, 6 M. & S. 1, the plaintiffs transmitted the bill of lading, which was to deliver the goods to their order, to B. & Co. their brokers, instructing them to sell, and he drew on B. & Co., as on former occasions, authorizing them to deal with the goods at their discretion; B. & Co.

accepted the bills, and placed the goods in the hands of the defendant, their factor, for sale, not disclosing to him that the goods were not theirs, B. & Co.'s, property, and B. & Co. drew on the defendant on account, which bill the defendant accepted, and paid, and sold the goods, and rendered to B. & Co. his account including the sale therein. B. & Co. failed before their acceptance for the plaintiff became due and their acceptance was dishonoured. *Held*, the plaintiffs were entitled to recover the proceeds of such sale from the defendant. Lord Ellenborough, C. J., said: "The plaintiffs consign to B. & Co. a valuable cargo of hides, imparting to them the most extensive authority which could be given to them as brokers, that is, to sell the hides at the discretion; that is, with power to regulate the time and place of disposal, the price and all other particulars incident to sale. The plaintiffs also stipulated they should be at liberty to draw on B. & Co. by way of advance, and, of course, could not have objected to any mode of sale which B. & Co. might adopt, in order to reimburse themselves for these advances * * But I find nothing from which to infer an authority to pledge. * * The case, as it is now presented, resolves itself into the ordinary case of a pledge by a factor." But the factors B. & Co. had no authority to pledge.

Bayley, J., said: "The fact that the plaintiffs drew bills against this consignment, and had also drawn in like manner against other consignments, makes no difference with respect to raising an implied authority. It is every day's practice between factor and principal so to do; and the only difference which this practice makes is, that it conveys to the factor a right to reimburse himself; but it is unnecessary for this purpose that he should be entitled to pledge. He may sell on credit and discount the bills, and if he fears that these means will not insure his reimbursement he must stipulate, if he will have it, for authority to pledge." In *Smart v. Sandars*, 5 C. B. 895, it was decided that a factor to whom goods have been consigned generally for sale, and who has subsequently made advances to his principal

on the credit of the goods, has no right to sell them contrary to the orders of his principal, on the latter neglecting on request to repay the advances, although such sale would be a sound exercise of discretion on his part—his authority to sell not becoming by reason of the unpaid advances irrevocable as an authority coupled with an interest. The plaintiff in that case, after receiving the advances from the defendant, instructed the defendant not to sell any more of his goods below a specified price, and then only to a limited extent, but the defendant sold without obeying such directions. Wilde, C. J., in that case, with reference to the remarks of Bayley, J., in the case of *Graham v. Dyster*, *supra*, that in default of the principal to pay the advances the factor may sell, said at p. 915: "These remarks were made with reference to a factor who had an express authority which had never been revoked, to sell at his discretion; and they furnish no authority for maintaining that, in a case where the principal has prohibited the sale under prescribed limits he may notwithstanding sell;" and after referring to several cases as to when an authority is revocable, and when it is not, he said: "The result appears to be that when an agreement is entered into on sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable. This is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable. But we think this doctrine applies only to cases where the authority is given for the purpose of being a security, or, as Lord Kenyon expresses it, as a part of the security—not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards, and incidentally only. As for instance in the present case, as disclosed by the 13th plea, the goods are consigned to a factor for sale; that confers an implied authority to sell; afterwards the factor makes advances. This is not an authority coupled with an interest, but an independent authority, and an interest subsequently arising. The making of such an

advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable; but such an effect will not, we think, arise independently of agreement. There is no authority or principle in our law, that we are aware of, which leads us to think it will.

The enquiry is, was there any agreement entered into on sufficient consideration whereby an authority was given for the purpose of securing some benefit to the donee of the authority (the plaintiff) by which he should be enabled to sell the goods he had on failure of the defendant to repay the advances, or to deliver to him goods sufficient to cover his advances? Or was the authority to the plaintiff to sell, on default of the defendant to pay or to secure the advances, given for the purpose of being a security and as part of the security? Or was there an agreement that there should be an authority to sell in consideration of the advances to be made? In any of these cases the authority to sell cannot be revoked. To determine whether the arrangement between the parties was one within the terms of any of the above propositions it will be necessary to look at the written agreement. For although the goods sent, but not to fill orders, were not within the terms of the written agreement, the parties apparently dealt with respect to the goods not within the written agreement upon the like terms as they dealt with the goods which were delivered under it. That is, advances were made upon them to the extent of seventy-five per cent, and they were sold from time to time by the plaintiff just as if they had been specially sent in fulfilment of orders and commission, and interest, at the like rates as in the written agreement, and insurances were charged upon such goods just as they were charged by the plaintiff on goods within the terms of the written agreement. The terms of that agreement expressly provide that the defendant shall deliver all the goods he manufactured to the plaintiff to sell, and that all sales of such goods should be made only by and through the plaintiff. Now the parties have been dealing throughout as if the goods not within the written

Agreement were to be dealt with as if they were within the written agreement. The only difference I can make out between the dealings, rights, and liabilities of the parties with respect to the two classes of goods is this, that the parties were bound to continue such dealing with the goods sent under the written agreement according to the terms of that agreement, while they were not bound to deal or to continue their dealing with respect to the goods not within the terms of that agreement longer than they both chose to deal in that manner; that is, either of them could discontinue such a dealing with respect to these goods at any time he pleased.

I hold, therefore, there was a special agreement, and founded on a good consideration, by which the plaintiff had the right to deal with the goods sent to him not within the written agreement, and upon which he made advances, just as he could deal with those which he received under the written agreement, and that the plaintiff had an irrevocable authority to sell the goods, but in my opinion, in like manner as he had the power to sell the goods which were delivered under the written agreement. That is, he was to sell them upon a *del credere* commission, at the remuneration of seven and a-half per cent., &c., and he was to make advances upon them to the extent of seventy-five per cent. of the wholesale trade value of the goods. And for that purpose the goods were to be invoiced by the defendant to the plaintiff at such value that he might be able to sell the goods to the best advantage. The parties contemplated by the agreement and provided:

1. That the plaintiff should sell all the goods manufactured by the defendant at his factory.
2. That the plaintiff should direct the defendant to deliver them to him from time to time as he required them to fill his order.
3. That the defendant should invoice the goods he sent to the plaintiff at such value that the plaintiff might be able to sell the goods to the best advantage.
4. That the plaintiff should sell as a *del credere* agent or factor at a commission of $7\frac{1}{2}$ per cent.

The sales provided for were to fill orders which plaintiff had received for the goods—that is from purchase of them; sales by auction were very likely not contemplated. The plaintiff was not obliged to take any goods excepting to fill orders which he had received for them at any time the plaintiff had goods on hand which one who gave an order for them refused to take—who became insolvent before they were delivered to him or from any other cause—and he could not dispose of them in the ordinary way to customers who came to him for them, what was he to do with these goods? Could he sell by auction if he pleased? A sale by private contract will not be enforced if the power is given to sell by auction, upon the ground that the power is not properly exercised: *Daniel v. Adams*, Ambl. 495; *In re Loft* 8 Jur. 1. In *Dart on V. & P.* 5th ed. 5, it is said: “And an express authority to sell by private contract would not, it is conceived, justify a sale by auction,” (referring to *Daniel v. Adams*, Ambl. 495,) unless the authority were to sell for a specified sum, and the price obtained at the auction (after payment of the incidental expenses) exceeded or equaled that amount.” In Ambler at p. 498, it is said by the Master of the Rolls, that the sale of land “was not like the case put of a factor, which is for the convenience of trade.” In *Sugden’s Law of Property* as administered by the House of Lords at p. 71-2, it is said an heir entitled to an estate tail in remainder upon his father’s life estate, and his heir expectant may deal for their rights according to their value in the market: “A sale by auction fairly conducted is binding, as the price obtained cannot but be deemed to be market value.” The thing is worth what it will fetch. *Earl of Aldborough v. Trye*, 7 Cl. & F. 436. I am of opinion, as trade sales are very usual, and as the market value of goods is probably as well ascertained at such sales as at any other, especially the trade or wholesale market value, that the plaintiff could sell by auction as well as by private sale if the sale were to the best advantage, and certainly if the sale was for not less than the invoiced price.

I am also of opinion under the interest which the plaintiff had in the goods, and from the nature of their dealings and arrangements, that if the defendant did not repay the advances made to him, or did not deliver to the plaintiff goods sufficient to keep his advances protected by a surplus of 25 per cent. of goods at the wholesale trade value, and it became necessary for the plaintiff to protect himself against such default, and he could not, within a reasonable time, have sold to customers, that he could sell by auction, and was not bound to delay until private sales could be made. These questions having been disposed of, the matters of fact have now to be considered. [The learned Chief Justice then proceeded to deal with the questions of fact, ultimately finding a balance of \$1,081.24 due to the plaintiff.]

A. H. F. L.

[CHANCERY DIVISION.]

EDWARDS V. PEARSON ET AL.

Will—Construction—Cumulative legacies.

A testator, after directing payment of his debts, and funeral and testamentary expenses, disposed of the residue as follows: "Secondly, I give to my wife \$150 annually, during her natural life, or so long as she may remain my widow, the said sum to be received and accepted by her in lieu of dower, the said yearly allowance to be a lien upon my real estate, and to be paid my said wife as she may need it, either quarterly or half-yearly." He then directed his executors to sell his farm and all his personal property except that previously disposed of, and out of the proceeds: first, to pay his debts, &c., as aforesaid, and to divide the balance then remaining between his sons, subject to each of them securing to their mother an annual payment of \$60 during her natural life, the security to be satisfactory to her and his executors.

Held, that there were sufficient points of difference between the first annuity and the subsequent ones, to make it apparent that the several annuities in favour of the widow were intended to be cumulative.

THIS was an action brought by Lavinia Edwards for the purpose of obtaining from the Court the construction of the will of her late husband, James Green Edwards, the provisions of which are sufficiently set out in the judgment.

The defendants to the action were the executors to the said will and the three sons of the testator, Joel Edwards, William Edwards, and Albert Edwards, who were the residuary legatees and devisees under the said will. The question in dispute was, whether the annuities contained in the said will in favour of the plaintiff were cumulative or not.

The plaintiff claimed that the will might be construed: that certain arrears might be paid to which she claimed to be entitled in respect of the said annuities to her: that the said annuities might be declared a charge upon the farm devised by the plaintiff; that the securities which under the said will, the said three sons of the testator were required to give, were subject to her approval, and the custody of them should be given to her; costs of suit and general relief.

The defendants, in their statement of defence, alleged that neither at the time of making his will, nor at his

Death, was the testator possessed of sufficient estate to pay the annuities, and they contended these were not meant to be cumulative.

The case came up on motion for judgment before Proudfoot, J., on May 30th, 1883.

D. Black, for the plaintiff. The legacies to the plaintiff are clearly cumulative: *Williams* on Executors, 8th ed., vol. 2, p. 1295; *Theobald* on Wills, 2nd ed., p. 114; *Hawkins* on Wills, Am. ed., p. 303; *Burkinshaw v. Hodge*, 22 W. R. 484; *Kirkpatrick v. Bedford*, L. R. 4 App. Cas. 96.

Moss, Q. C., for the defendants, the residuary legatees and devisees. The presumption is, that the two legacies to the plaintiff, given as they are by the same instrument are meant to be repetitions one of the other, and not cumulative. After the first gift of \$150 annually, the testator directs a sale of the estate, which indicates that he knew it would be requisite to sell it to produce the annuity. The intention was, that the sons should not enjoy the estate unless the annuity of \$150 was secured. The provisions as to the second sum of \$50 from each son are fully satisfied by supposing it was intended to secure the sum previously given. Then the circumstances of the case show that a cumulative gift was not intended. I refer to *Roper* on Legacies, 998; *Martin v. Drinkwater*, 2 Beav. 215; *Hooley v. Hulton*, 1 Bro. C. C. 390; *Coote v. Boyd*, 2 C. C. 521; *Tuckey v. Henderson*, 33 Beav. 174; *Russell v. Dickson*, 4 H. L. C. 293; *Kidd v. North*, 14 Sim. 463; 463; *Campbell v. Lord Radnor*, 1 Bro. C. C. 271; *Moggridge v. Thackwell*, 1 Ves. 464; *Holford v. Wood*, 4 Ves. 79; *Early v. Benbow*, 2 Coll. 354; and as to costs, I refer to *Stevenson v. Stevenson*, 28 Gr. 232.

T. J. Robertson, for the executors.

June 7, 1883. PROUDFOOT, J.—J. G. Edwards made his will on April 13th, 1872, and died on January 6th, 1882.

By his will he directed his debts and funeral expenses to be paid by his executors. The residue not required for

the payment of his debts, funeral charges, and the expenses attending the execution of his will and the administration of his estate, he gave as follows:

"Secondly, I give, devise, and bequeath to my beloved wife, Lavinia Edwards, the sum of \$150 annually, during the remainder of her natural life, or so long as she may remain my widow, the said sum to be received and accepted by her in lieu of dower; the said yearly allowance to be a lien upon my real estate, and to be paid my said wife as she may need it, either quarterly or half-yearly." He also gave his wife his household furniture to dispose of as she might think proper. He then directed his executors to sell his farm and all his personal property, except that previously disposed of, and out of the proceeds, first, to pay all his debts and funeral charges, &c., as aforesaid; and to his son Peter, \$212. He then gave to each of his daughters, Ann, Jane, Martha, Sarah, Phœbe, and Mary, \$312: "The balance then remaining to be divided between his sons Joel, William, and Albert, subject to each of them securing to their mother an annual payment of \$50 during the remainder of her natural life, the security to be satisfactory to her and his executors."

The question is, whether the legacies to the wife are repetitions, or cumulative legacies.

It is admitted that the estate is not sufficient to pay all the legacies, if those to the wife are cumulative.

In the absence of any intention apparent on the face of the will, the rule is, that where two legacies of quantity of equal amount are bequeathed to the same legatee by one instrument, there the second bequest is considered repetition, and the legatee shall be entitled to only one legacy: *Williams on Executors*, 7th ed., vol. 2, p. 1295.

Then what is the intention apparent on the face of the will?

The first legacy is an annuity of \$150 for life or during widowhood; it is given in lieu of dower; it is to be a lien upon the real estate; it is to be paid as she may need it, quarterly or half-yearly.

The sale of the land to be made by the executors, must therefore be subject to this annuity, and the balance of the proceeds, i. e., the residue of the residue, is to be equally divided between the three sons, each of whom is to pay his mother \$50 a year, during her natural life; and for this payment each of them is to give security satisfactory to the widow and the executors.

The one legacy is a charge on the land, the other is not; one is payable during life or widowhood; the other during life. One is in lieu of dower, the other not. One is given as an entire sum of \$150 per annum; the other in three sums of \$50 each. The sons give no security for the one—they do for the other. The land is to be sold subject to the one; the other is to be payable by the legatees of a portion of the proceeds of the sale, and therefore after the one is provided for. One is to be paid as the legatee may need it quarterly or half-yearly. There is no such provision with regard to the other.

In all these respects there is so much difference between the legacies that the latter, if the last three are to be deemed one, cannot be considered a repetition of the former.

Nor do I think that the insufficiency of the estate to answer all the legacies is a sufficient circumstance to vary this construction of the will. It is no uncommon thing for testators to express an intention of liberality beyond their ability to fulfil; and if he has done so in this instance, why is the widow to be the only legatee to suffer? The testator gave the first annuity as an equivalent, in part at least, for the dower of the legatee. The three sums of \$50 are to be paid by the sons as a condition of their taking anything under the will.

There seems to be enough of the estate to provide for the first annuity and to pay the legacies prior to the gift to the sons, Joel, William, and Albert. The widow, in regard to the three annuities of \$50, cannot call for any abatement of the specific legacies, as she is only to receive them out of the residue after payment of these specific

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s. These sons, it is said, decline to give security for
ent. In that event the wife is entitled to all that is left
to them, if necessary, to secure her annuities of \$500 and \$500

no difficulty has arisen from the bequests in the will, will,
the costs of this suit are costs attending the execution of the will
the will or the administration of the estate, which are to be
primary charge on the estate, and must, therefore, be
paid out of the estate generally. Practically, I suppose, these
three sons.

A. H. F. L.

[CHANCERY DIVISION.]

RE J. T. SMITH'S TRUSTS.

*Repairs by tenant for life—Settled estate—Sale or lease by Court—Settled
Estates Act, 1856—Imp. 19-20 Vic. ch. 120—R. S. O. ch. 40, sec. 85.*

J. T. S. devised certain lands to M. H. for life, and afterwards to any child of M.
H., who might survive her, in fee. M. H. had one child, aged ten, when she
petitioned under Imp. 19-20 Vic. ch. 120, claiming to be allowed for expen-
diture made by her upon two houses on the land for much needed repairs, and
lasting improvement, and also for \$100, paid to a tenant for improvements made
by him under a promise from the testator that he should be paid for them; and
praying for a sale, or power to lease.

Held, that M. H. might be reimbursed the \$100, from the testator's general estate,
as this appeared to have been a debt due by the testator; but neither this nor
the other expenditure could be charged on the land.
Held, further, it appearing that there was no means from the income of the
property of putting it into a sufficiently remunerative condition to support M.
H., and her child, it was a proper care for the sale or leasing of the estate, with
a right to build.

The repairs of a tenant for life, however substantial and lasting, are his own
voluntary act, and do not arise from any obligations, and he cannot charge the
inheritance with them.

as a petition in the matter of the Imperial Set-
19-20 Vic. c. 120, and amending
the matter of a certain
the trusts

Mary H. Holland, and the executors and trustees of the said will.

The petition set out, that by his will, dated April 4th, 1874, the said J. T. Smith devised the land in question to his executors, their heirs and assigns, to hold, firstly, in trust for the said Mary H. Holland, absolutely during her natural life; secondly, after her death, in trust for the children who might be living, and the descendants in the direct line of such child or children as might be dead, *per stirpes*, of the said Mary H. Holland, as tenants in common in fee; thirdly, in the event of the said Mary H. Holland dying and leaving no children or descendants of children in the direct line her surviving, then to hold the same as part of the testator's residuary estate, and to sell the same and invest the proceeds as therein directed. The petition went on to allege that the said will did not contain any power to sell the said lands and premises until the decease of the said Mary H. Holland leaving no children or descendants of children her surviving: that the said Mary H. Holland had only one child, who was now living, and an infant of the age of ten years: that the husband of the said Mary H. Holland died in 1881: that part of the land in question was unbuilt upon, though it formed an eligible building lot: that this portion of the land was a burden only by reason of the taxes to be paid thereon: that the said Mary H. Holland was wholly, or almost wholly, dependent on the rents of the said land for support and that of her said son: that when the said Mary H. Holland entered into the enjoyment of the said lands under the will, she found certain dwelling-houses which were on it so dilapidated from age and out of repair that tenants would not rent or occupy them unless repairs and improvements involving a large expenditure were made, and in order to make the said lands productive and to yield a rent, she spent considerable sums of money in repairing the same, but that lately they had become so bad from age that she had had to expend upwards of \$500 in beneficial, lasting, and substantial

ations and improvements thereto, and in consequence the said houses were let to tenants, and continued to yield the \$300 per annum, but they were constantly requiring repairs, and such repairs and expenses cut off the means of livelihood of the petitioner and her son: that the said Mary H. Holland submitted she was entitled to a lien or charge on the said lands and the proceeds thereof when sold for the moneys so expended by her: that the said lands would sell for about \$7,000: that notwithstanding the aforesaid alterations and improvements, the said dwellings were in need of many modern improvements and many alterations and repairs to put them on an equality in the view of tenants with the surrounding properties, and the said lands with the buildings thereon in their present state and condition did not yield a rent adequate to the value thereof, nor would they yield a large rent unless a further sum were expended in rebuilding the said dwellings in part: that the petitioners believed a sale of the said lands and the investment of the proceeds would be most beneficial for all parties interested therein, and that the income from such investment would far exceed the present rent derived from the said dwellings and lands. And the petitioners submitted that the said lands should be sold and the proceeds applied, firstly, in payment of the costs of this application; secondly, in payment of the said sum expended by the petitioner Mary H. Holland as aforesaid, and that the balance be invested as directed by the trusts of the said will.

The petitioners accordingly prayed a sale under the direction of the Court, and payment out of the proceeds, and investment of the balance as aforesaid; and that in case a sale should not be ordered, a general power of leasing might be vested in the trustees.

Affidavits were filed in support of the allegations of the petition, the chief of which was one by the said Mary H. Holland, in which she asserted, amongst other things, that she was unable to make the necessary repairs still required to the said houses; and also, that

during the testator's life-time he made an agreement with one John Gillespie, a tenant of one of the said dwelling-houses, allowing the said Gillespie to make certain plumbing improvements in the house occupied by him, and agreed to pay the said Gillespie, his executors, administrators or assigns therefor, on the expiry of his lease: that in 1881 one George Gillespie, as assignee of the said John Gillespie, called upon her to pay him for the said improvements, and on a valuation being made the value was put at \$100, which she paid to the said George Gillespie by allowing him to deduct the same from his rent; and that she could not, from the receipts of the property in its present condition, support her said child and herself, and would be unable to give her said child the advantages in education which his situation in life would require, and it was urgent the said property should be dealt with immediately.

The petition was heard on June 13th, 1883, before
Boyd, C.

J. Arnoldi, for the petitioner, Mary H. Holland.

T. S. Plumb, for the infant child of Mary H. Holland,
cited *Caldecott v. Brown*, 2 Ha. 144.

June 20th, 1883. BOYD, C.—The testator has devised the property in question to his niece Mary Holland, one of the present petitioners, for her life, and afterwards to any of her children who may survive her in fee simple. She is a widow and has one child aged ten. She claims to be allowed for expenditure made by her upon two houses on the land for repairs and lasting improvements to about \$500, and for \$100 paid to a tenant for improvements made by him under a promise by the testator that the tenant should be paid for them. As to this last item, it would be proper to reimburse Mrs. Holland from the testator's general estate, as the claim she paid appears to be a debt due by the testator, but I do not see on what principle I can make it a charge on the land, so as to prejudice the

infant, or those who take if he predeceases his mother. According to English law I am precluded from charging the other expenditure on the estate. No application was made for the sanction of the Court before the outlay was made, which is always a circumstance considered by the Court: *Dent v. Dent*, 30 Beav. at p. 369. But even had such an application been made it is against all the authorities to burden the estate with such charges. The land was not occupied and so far as I am informed was not intended to be occupied by the beneficiaries. There were two houses upon it which have been rented, and no case would warrant my charging the repairs made on the inheritance. A distinction exists between such buildings, and a mansion house which is meant for the personal occupation and enjoyment of persons successively in possession of the estate. Where a mansion house has been commenced by the settler, but it is not finished at his death, it may be completed in ordinary cases at the expense of the estate; but if even the mansion house gets out of repairs, the tenant for life will not be allowed to renovate it and charge the land, but will be expected to do this in return for the enjoyment of the house; *a fortiori* no expenditure for repairs to other buildings will be made a charge upon the real estate: *Hibbert v. Cooke*, 1 Sim. & Stu. 552; *Gilliland v. Crawford*, Ir. R. Eq. pp. 39-41; *Floyer v. Bankes*, L. R. 8 Eq. 115, (a very strong case). The law is thus summarised in *Lewis on Trusts*, (7th ed. p. 503), "The repairs by a tenant for life, however substantial and lasting, are his own voluntary act and do not arise from any obligation, and he cannot claim any charge for them upon the inheritance."

Upon the evidence this appears to me to be a proper case for the sale or leasing, with a right to build, of the settled estate. There is no means from the income of the property of putting it into a sufficiently remunerative condition to support the mother and child. She is not obliged to support the infant, and it will be imperative to deal with the property in such a way as to supply proper maintenance for the boy. If the guardian assents I should think

an absolute sale would be the best plan. If not, let the master receive tenders for renting it, as for a building leasehold, and then there must be some arrangement for the proper support of the child. The parties may mention the matter again as to what is resolved upon, or may lay a scheme before me.

A. H. F. L.

[COMMON PLEAS DIVISION.]

THE PHOENIX INSURANCE COMPANY V. THE ANCHOR
INSURANCE COMPANY.

*Marine insurance—Re-insurance—Contract in accordance with rules—
worthiness—Total loss—Abandonment—General average—Particular
average—Costs.*

On 1st September, 1881, the plaintiffs insured the vessel *Mary Merritt* for \$15,000 for fifteen days, by acceptance of an application made to them by M. J. Merritt, owner. On the same day a memorandum was written in the margin of the application and signed by the manager and secretary of the defendant company, that they covered one fourth, subject to survey and approval at first port of arrival, &c. It was understood that there was an allowance of 8 per cent for particular average. On 4th April, 1881, an agreement had been entered into between the companies under which defendants were to cover a fourth part of all vessel risks accepted by plaintiffs: but it was expressly agreed that the risks covered were only on hulls of vessels not classed below B. 1.

By defendants Act of Incorporation, 35 Vic. ch. 103, D., all policies, instruments, &c., issued or entered into by defendants, were to be signed by the president or vice-president, and counter-signed by the manager and secretary, or as otherwise directed by the rules and regulations of the company in case of their absence, and so signed they should be deemed valid, &c.

Held, that the plaintiffs could not rely on the agreement of the 4th April, as it was limited to vessels not below B. 1, and the vessel insured had not been classed; but that the contract was contained in the memorandum written in the margin of the application, and that it was so signed as to be binding on the defendants, for that, in the absence of evidence to the contrary, it must be deemed to be signed in accordance with the rules and regulations of the company.

It appeared that the vessel was driven ashore on the 6th September, and that the plaintiffs got her off and towed her to Detroit, where she was put into dry dock and repaired. The salvage charges amounted to \$4000. On 26th September, the owner gave notice of abandonment, and claimed as for a total loss, and the plaintiffs settled with him for \$3000. On 29th September the vessel was libelled for seaman's wages and salvage charges, and was subsequently sold to pay same. The actual damage done to the vessel only amounted to \$175. At the time of the accident the vessel had only one anchor, having a short time previously lost a second one she had. There was no express warranty of seaworthiness.

Held, that the policy being a time policy there was no implied warranty of seaworthiness.

Held, also, (1), defendants as re-insurers were not bound by the plaintiffs' settlement with the owner or the acceptance of the notice of abandonment, and that as to them there had been no total loss and no valid abandonment; (2) defendants were liable as upon a general average for expenses incurred by plaintiffs as salvors and insurers in saving the ship, after deducting the proportion to be borne by the owners of the vessel and cargo, &c.; (3) there was no particular average for which defendants were liable to contribute.

The pleadings were directed to be amended according to the findings; and the costs apportioned.

THIS was an action tried before Osler, J., without a jury, at the Toronto Summer Assizes, 1883, to recover \$1,642 upon a policy of re-insurance effected by the plaintiffs with the defendants re-insuring one-fourth of a risk of \$6,000 taken by the former upon the schooner "*Mary Merritt*."

under an instrument described as a "Binding Application," in the following terms:

"Insurance is wanted in Phoenix Insurance Company, for account of James Murray. Loss, if total, payable to Quebec Bank on schooner 'Mary Merritt.' Registered Custom House tonnage, 412; class, . Each package from port to port subject to its own average. Warranted by assured free from particular average under per cent. For one year from the 1st September, 1881, to the 1st September, 1882. Trade. To be employed on inland lakes and rivers; privilege of towing. For \$6,000, at \$7.20 per cent. premium. Vessel valued at \$8,000. Insurance limited to \$6,000. This application to be considered binding until rejected and due notice given to the applicant or approved and contract of insurance perfected by issue of the Company's policy at New York by the Company.

Binding. { J. MURRAY, Applicant.
 { J. C. GRAHAM, Agent.

1st September, 1881."

Across the face of this instrument was written by Captain Douglas, the general agent of the plaintiff company:

"Held covered until the 15th instant, pending survey and class, which, if below B. 1, this application will be rejected, charging for the time covered till that time. J. T. D., General Agent.

Afterwards, on the same day, in the application of Captain Douglas, the following memorandum was written in the margin by the manager and secretary of the defendant company:

"Anchor cover one-fourth, subject to survey at first port of arrival, and being entitled to B. 1 class. HUGH SCOTT, Manager and Secretary."

The plaintiffs also put in an agreement dated the 4th April, 1881, called an "Inland Hull Open Policy," made between themselves and the defendants, signed by W. P. Howland, president, and Hugh Scott, manager and secretary of the defendants, the material clauses of which were as follows:

"This policy of re-insurance in consideration of the payment of a proportionate share of the premium and * * of other undertakings herein expressed is to cover one-fourth part of each and every risk on a vessel, * * the Phoenix Insurance Company shall accept or become liable for, from and including the date hereof to and including November 30th, 1881. * * Each risk to attach at same time with

and be subject to the same risks and conditions as the original risk on the conditions of the policy attached hereto. • •

"Report of each risk applicable hereto is to be mailed not later than the day following receipt of advice thereof at the head office or chief agency in Canada of the Phoenix to the head office of the Anchor.

"This policy is subject to the same risks, conditions, valuations, and modes of settlement, as well in general as in particular average or total loss, as are or may be assumed by the said Anchor Insurance Company, together with proportionate benefit of salvage, and payment of loss is to be made at same time, place and manner with the Phoenix company.

"It is expressly understood that risks are covered under this policy only on hulls of vessels not classed below B. 1, nor valued below \$5,000 on the Inland Lloyd's Classification Register for 1881."

A blank form of Inland Hull Policy was attached to the agreement, which contained the following clauses :

"It is agreed that the acts of the assured or assurers or their agents in recovering, saving, and preserving the property assured in case of disaster shall not be considered a waiver or acceptance of an abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned and without prejudice to either party. Further, the assured shall not have the right to abandon the vessel in any case unless the amount which the assurers would be liable to pay under an adjustment as of a particular average loss, exclusive of general average charges and charges in the nature of general average, shall exceed half the amount of the valuation aforesaid.

• • • Moreover no abandonment in any case whatever, even when the right to abandon may exist, shall be held or allowed as effectual or valid unless it shall be in writing by the assured, and delivered to the assurers or their authorized agent, nor unless it shall be efficient if accepted to convey to or vest in the said assurers an unincumbered and perfect title to the subject abandoned, and the valuation of said vessel as expressed in this policy shall be considered the value in adjusting losses covered by this policy.

"It is furthermore expressly provided that no suit or action against the assurers for the recovery of any loss or damage under this policy shall be sustained, unless commenced within twelve months after loss. Lapse of time to be conclusive evidence against validity of claim, if action brought after twelve months."

No policy was in fact issued by the plaintiffs. It was assumed at the trial that it would have contained an allowance of 8 per cent. for particular average. Beyond this, however, there was no evidence of the contents of their usual form of policy.

On the 1st September, the "Mary Merritt" left Collin's Bay for Port Sauble on Lake Superior. She lay to at the port of Latour, near the mouth of the St. Marie River, waiting for a tug. While there she lost her small anchor, which was not replaced, and was taken into Lake Superior with one anchor only.

On the 6th September, having taken on board a cargo of timber, she was driven ashore in a storm about three miles westward of Sauble light.

The plaintiffs thereupon, without communicating with the owner, sent Captain Rice, an officer in their employment, with instructions to see what could be done. As the vessel did not appear to have sustained much damage, he thought it best to try to get it off, and accordingly having procured from Detroit a tug, steam pumps, diver, and the necessary apparatus, he proceeded to do so. The cargo was thrown out and taken by the owners, and on the 4th September, after two days' labour, the vessel was successfully got off and towed to Detroit, where it was put into dry dock for repairs.

Captain Rice said he thought it was best in the interest of a concerned to take this course. He did not, however, before doing so, communicate with either the owner or the defendants, or with either of the other re-assurers.

The salvage charges, including the cost of putting the vessel into dry dock, and Captain Rice's charges, were proved to be upwards of \$4,000.

On the 20th September, the owner served a notice of abandonment declining to recognize any of the expenses then or hereafter to be incurred in respect of the vessel.

On examination the vessel was found to have sustained trifling injury to her bottom and rudder, which was repaired for less than \$175.

On the 29th September, 1881, while lying at the port of Detroit, the vessel was libelled in the District Court of the Eastern District of Michigan for seamen's wages due to them before and after the injury, amounting to about \$200 and also for salvage services to the amount of \$4,035.11.

By an order of the Court, dated 19th October, 1881, made in the suit on the application of the libellants, the vessel was ordered to be sold, and the proceeds of the sale paid into Court. Notice of the sale was given to the owner and to the agents of the underwriters. No defence was made to the action, and the vessel was sold for \$2,700 or \$2,800, and the proceeds applied towards payment of the claims of the libellants without intervention on the part of the owner or underwriters, and without notice to the defendants.

The insured claimed as for a total loss, and the plaintiffs compromised with him for a payment of \$3,000 and a waiver of the premium note, in September, 1882, being advised that in consequence of having taken possession of the vessel they were estopped from saying that there had been no valid abandonment.

The case was fully argued.

McMichael, Q. C., and *W. T. Boyd*, for the plaintiffs.

Osler, Q. C., and *C. R. W. Biggar*, for the defendants.

The learned Judge, after taking time to consider, delivered the following judgment:—

July 15, 1883. OSLER, J. — The first question is, whether there is a binding contract of re-insurance.

I think the plaintiffs cannot rely upon what is called the "pooling" agreement of the 4th April, as that is in terms expressly limited to classified vessels and not lower than class B 1. The vessel in question was not classified, and it is clear that both plaintiffs and defendants thought it necessary that something more should be done than merely to report the risk, which is all that was needed under the agreement.

The contract is to be found only, if at all, in the memorandum signed by the defendants' manager and secretary in the margin of the "binding application." None of the terms of the other agreement can be imported into it, as the latter is not referred to in or made part of it in any way.

It was argued that the memorandum was intended merely as a note that re-insurance would take effect under the pooling agreement upon survey and classification of the vessel at the first port of arrival, and not as an immediate re-insurance.

I think, however, that as the plaintiffs were insuring absolutely for fifteen days, also pending survey and class, and as the memorandum would have been unnecessary for the purpose of effecting insurance under the pooling agreement, the defendants' contract must be taken to be a re-insurance of the risk taken by the plaintiffs under the terms of the application, and Captain Douglas's acceptance of it.

The defendants next contend that the memorandum, being signed by their manager and secretary only, is not executed so as to be binding upon them under their Act of incorporation, 35 Vic. ch. 103, D.; and they rely upon section 14, which provides that "All policies, cheques, and other instruments issued or entered into by the said company shall be signed by the president or vice-president and countersigned by the manager or secretary, or as otherwise directed by the rules and regulations of the company in case of their absence; and being so signed and countersigned shall be deemed valid and binding upon the company according to the intent and meaning thereof."

But persons dealing with the company would see on examining this section, and they are not bound to do more, that an instrument within the scope of the company's powers might be validly executed otherwise than by being signed by the president or vice president and countersigned by the manager or secretary, for the rules and regulations of the company may provide for its being otherwise done in case of their absence, that is, the absence of either of them. Seeing an instrument, therefore, purporting to be signed on behalf of the company, such persons would have the right to presume, in the absence of evidence to the contrary, and there was no such evidence here, that it was validly executed in any way in which it

might be so executed, and there is no reason why by the rules and regulations of the company it might not be executed by the manager and secretary only.

The cases of *Royal British Bank v. Turquand*, 6 E. & B. 327; *Totterdell v. Farnham Blue Brick, &c. Co.*, L. R. C. P. 674, and *D'Arcy v. Tamar, &c. Ins. Co.*, L. R. Ex. 158, are sufficient authority for this proposition.

I hold, therefore, and it is the single point I am considering in relation to the actual agreement, that it is contained in the memorandum only, and that the memorandum is so executed as to bind the defendants.

It was next objected that the defendants were not liable for the loss, on the ground of the unseaworthiness of the vessel, such unseaworthiness consisting in this, that she was allowed to proceed into Lake Superior with only one anchor after she had passed a port where she ought to have replaced the one lost at Latour.

There was, however, no express warranty of sea worthiness, and the policy being a time policy, no such warranty could be implied: *Dudgeon v. Pembroke*, 2 App. Cas. 284; *Thompson v. Hopper*, 6 E. & B. 172.

Moreover, there was no evidence that a vessel is unseaworthy merely because she has but one anchor, nor can I say from Patterson's evidence that it is reasonably clear that the stranding was caused by the absence of the second anchor.

The defendants further contend that there was neither an actual nor constructive total loss: that the notice of abandonment was ineffectual; and that the plaintiffs, if entitled to recover at all, are limited to the particular average loss on the vessel, and a contribution to the general average loss incurred by the measures taken for its preservation.

As to the former, it is also argued that it is covered by the per centage clause of the policy.

It was urged that under the conditions of the contract of the 4th April, (1) the abandonment was bad in any case, as it did not convey a clear title to the vessel, which was

subject to the prior lien for seamen's wages ; and (2) that the present action was brought too late.

I have already given my reasons for thinking that the present re-insurance is not within the terms of that contract. Even if it was, I think there would be some difficulty in applying the conditions found in the form of policy attached to it.

I need not, however, further discuss this point, which is the less important, as the defendants are entitled to take advantage of all the defences which the plaintiffs might have set up to an action on the original policy.

"The re-insurer is entitled to make the same defence to an action brought against him on the second policy as the original insurer might on the first; but he is not necessarily limited to such defence. He is consequently not bound by the first owner's acceptance of an abandonment:" *Arnould on Marine Insurance*, 5th ed., vol. i, p. 103; *New York Marine Ins. Co. v. Protection Ins. Co.*, 1 Story R. 458. And in the absence of any stipulation to the contrary the re-insurer is not bound by any settlement or adjustment of the loss made by the original insurer: *Emerigon on Insurance*, 205; *New York State Marine Ins. Co. v. Protection Ins. Co.* 1 Story R. 458.

It is quite clear, that up to the time of giving notice of abandonment, nothing had occurred which entitled the insured to treat the vessel as a total loss.

"The question between the assured and the underwriters on the ship is, whether the damage sustained may be so far repaired as to keep it a ship, though not perhaps so good a ship as it was before, without expending on it more than it would be worth:" *Rankin v. Potter*, L. R. 6 H. L. 83, at p. 117.

There was no actual total loss, for the vessel although stranded was found to have sustained so trifling an injury that it was repaired and made as good as ever by an expenditure of less than \$175. In other words, it was not so damaged as to be incapable of being repaired at all, or of being taken to a place where it could be repaired: *Roux*

v. *Salvador*, 3 Bing. N. C. 266; *Arnould on Marine Insurance*, 5th ed., vol. 2, p. 910, 911.

Nor was there a constructive total loss. Taking the vessel's actual and not its policy value—*Irving v. Mann*, 1 H. L. Cas. 287—I find as a fact on the evidence that it was worth much more than the cost of getting it off and repairing it.

"The test by the law of England clearly is, whether a prudent man would think it worth his while to attempt to save and repair the vessel, and it is assumed that he would not do it unless he had the prospect of gaining something by the attempt; in other words, that he would not make the attempt unless it appeared probable that the vessel when got off and restored to the state she was in before the accident, would be worth as much as the operation would cost him." *Meagher v. Aetna Ins. Co.* 20 U. C. R. 607, 620: *Arnould on Marine Insurance*, 5th ed., vol. ii, pp. 910, 911.

There was, as I have said, nothing to justify the notice of abandonment at the time it was given. The vessel was then in safety, and the whole cost and expense of getting it off and repairing it ascertainable. The subsequent conduct of the plaintiffs may have estopped them as against the owner, from saying that they had not accepted the abandonment, but the defendants are not affected by this.

I cannot see why the plaintiffs did not pay the salvage charges incurred by their express authority, and those for repairing the vessel, (even if there was a doubt as to their liability for the latter), and either tender it back to the assured or give him notice that it was at his disposal subject to the claims for seamen's wages. Had they done so, no further claim could, as appears to me at present, have been maintained by him, on the policy.

The plaintiffs would have been liable to the assured upon a general average for extraordinary expenditure incurred in saving the vessel and cargo had it been incurred by him. But they were themselves the salvors and the insured and the owners of the cargo were therefore liable to contribute in the general average, th

3. That the cargo was in fact salvaged by the plaintiffs and delivered to the owners.

4. That there was no particular average loss for which the plaintiffs were responsible, or towards which the defendants are liable to contribute.

If necessary the pleadings should be amended in accordance with the view which I have taken of the rights of the parties.

As to costs, I think they should be apportioned, the defendants having succeeded in respect of a substantial part of the plaintiffs' claim. I therefore direct that the plaintiffs shall have three-fourths of the whole costs of suit as between party and party, including the costs of reference above mentioned.

Judgment accordingly— —

[COMMON PLEAS DIVISION.]

OATES V. THE SUPREME COURT OF THE INDEPENDENT
ORDER OF FORESTERS.

*Provident society—Insurance—Suspended Court—R. S. O. ch. 167, sec. 11—
Amendment—Pleading.*

was a member of Court Maple of the defendants' order, and was insured under the endowment provisions thereof for \$1000. This Court left the order in which he had joined another order of Foresters, and it was in consequence suspended. On joining the new order it was arranged that O., who was in ill health and had gone to California for change, should be taken and insured with the other members. By the rules of defendant's order members of suspended Courts in good standing at suspension were, on application within thirty days to the supreme secretary, and payment of a fee of \$1, to receive a card of membership and be entitled to the endowment, provided they paid all assessments as they fell due, and affiliated with another lodge of the order; but, if after thirty days, they must pass a medical examination. O., on his return from California, on ascertaining that Court Maple had been suspended, within the thirty days, being then in good standing, applied to the defendants' supreme secretary for a card of membership, tendering \$1 and assessments due, which was refused on the ground that a medical certificate was necessary. O., by reason of his not having the card, was prevented from affiliating, though he endeavored to do so, with another Court. By the endowment certificate the \$1000 was payable to the widow, orphan, or legal heirs of O., and by endorsement thereon O. directed the amount to be paid to the plaintiff, the widow. It was held, that under the directions so given, as well as under R. S. O. ch. 167, sec. 11, the widow was entitled to recover the amount; and that the fact of O. joining a member of another order did not *ipso facto* deprive him of his rights in the membership of defendant's order. At the trial an amendment was asked, to set up a forfeiture of the policy by reason of O. having gone to California without a permit, which was refused by the judge. It was held, under the circumstances, the refusal was proper. It was also held, whether the way, cause, and manner in and for which O. and the other members of Court Maple left it and joined in a body another order might not, properly pleaded, have required some consideration. The frame and effect of the pleadings in this case considered.

The statement of claim set out:

1. That the plaintiff is the widow of Benjamin S. Oates.
2. That the defendants are a provident society incorporated under the laws of the Province.
3. That the defendants on the 27th of February, 1879, by deed covenanted to pay to the widow of the said Benjamin S. Oates the sum of \$1,000, on due and satisfactory proof of the death of Benjamin S. Oates, provided that at the date of his death he should be a member in good standing in the Order of Independent Foresters, according to the laws, rules, and regulations of the defendants.

4. That Benjamin S. Oates died on the 11th of January 1883. And all conditions were fulfilled, and all things happened, and all times elapsed necessary to enable plaintiff to be paid the said sum of \$1,000 by the defendants, but they have neglected and refused to pay the same, or any part thereof.

Statement of defence :

1. Denial of the third and fourth paragraphs of the statement of claim.

2. That the defendants are governed by certain laws, rules, and regulations, to which all members are subject, and by which power is given to the Supreme Chief Ranger to suspend any Court for non-payment of assessments, or for failing to make required returns, and to deprive all members of such Court from all benefits. And the defendants say the said Benjamin S. Oates was a member of a Court which failed to pay assessments and make required returns. And therefore the Supreme Chief Ranger did for that cause suspend the said Court and deprive all members thereof of all benefits, whereupon Benjamin S. Oates ceased to be a member of the defendants' Order, and he was never thereafter restored or admitted to membership, and at the time of his death, as alleged in the statement of claim, was not a member of the defendants' Order.

3. That no proofs of the death of Benjamin S. Oates have been furnished to them as required by their laws, rules and regulations, and until such proofs are furnished the plaintiff is not entitled to maintain this action.

Replication :

1. The plaintiff takes issue on the statement of defence.

2. The plaintiff admits the power of the Supreme Chief Ranger during a recess of the Supreme Court to suspend a subordinate Court for neglect or refusal to make returns, or failure to pay its assessments to the endowment or other funds, or its dues to the Supreme Court within the legal time; but the plaintiff says that the said Chief Ranger had no power to deprive absolutely the members of such Court from the benefits of the endowment

other funds, and that the said Benjamin S. Oates never was absolutely deprived of the said benefits.

3. That if any restoration or re-admission of the said Benjamin S. Oates to membership in the defendants' society were necessary to entitle him to the said benefits, such restoration or re-admission was prevented by the wrongful act of the defendants in refusing such restoration or re-admission except the said Benjamin S. Oates should first pass a medical examination, which the defendants well knew the said Benjamin S. Oates to be unable then to do. Issue.

The cause was tried before Patterson, J. A., without a jury, at London, at the Fall Assizes of 1883, when he gave a verdict for the plaintiff, and damages, \$1,040, with costs.

The evidence shewed the husband of the plaintiff became a member of the defendants' society in September, 1878, and continued such member until September 1882, when the Court was suspended. He had a policy, but gave it up before the present one of the 6th of May, 1882, was issued. [Note.—The policy declared on is said to be dated the 27th of February, 1879: that must be the former one.] He belonged to the Independent Order of Foresters, in Court Maple, No. 4, located at London. That Court was suspended while Oates was absent in California. He returned here in September, 1882, and he, shortly after his return, ascertained the Court had been suspended.

On the 9th of that month he sent \$1.70 to the Supreme Secretary for the Supreme Court card, and the present month's assessment. The money was returned to him, and he was told to apply to the Supreme Chief Ranger. He did so, and inclosed him \$1.70.

The Chief Ranger on the 21st of the same month wrote to Oates that in order "to re-instate yourself, you will require to pass a proper medical examination. I enclose you a form for the purpose. You can be examined by Dr. Fenwick, or any other Court physician living in the city. See sections 246 and 262 of constitution edition of 1881."

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On the 29th of the month Oates wrote to the Supreme reasurer, enclosing him seventy cents, one month's endowment assessment, for which he asked to be given credit. "I have made application for a Supreme Court card, and the Supreme Chief Ranger has the case under consideration and will doubtless advise you in the matter upon his return home."

He appeared to have applied for affiliation to Court Victoria, No. 10, of the Independent Order of Foresters, for on the 10th of October, 1882, J. S. Garner wrote to him saying: "Your application for affiliation to hand, and inasmuch as it is not accompanied with your Supreme Court card, as provided for per constitution, the Court could not entertain it. If you procure the said card, the Court will only be too willing to entertain your application. I herewith enclose you the amount you enclosed in your of October 10th, 1882, viz., \$1.70."

On the 21st of October, Oates again wrote to the Supreme Secretary, and referred to his former communication to his secretary, and to the Chief Ranger, and to Court Victoria, No. 10. "I now make application to become a 'member at large' of the Order, (see sec. 167) and enclose you the annual fee, \$2.00, and one month's assessments, seventy cents. Trusting that I will meet with no further difficulty in retaining my membership in the Order," &c.

The Chief Ranger, to whom the Supreme Secretary had sent Oates's letter of the 21st, answered it on the 23rd of the month. He repeats that the Court Oates belonged to had been suspended, and all the members had been deprived of the benefits. "If you desire re-instatement in our Order, you must comply with our requirements. See sections 246 and 262. I again enclose the prescribed form, which you can take to any Court physician and have properly filled up, after which return it to me, and if satisfactory you will be re-instated, and card issued to you by the proper authorities."

On the 24th of the month, the Supreme Secretary w

Oates, returning to him the \$2.70 Oates had sent in the letter of the 21st: "As you have failed to comply with the requirements of our laws, I have no authority to receive your money. I therefore beg herewith to return the same."

On the 30th of October, Oates in writing formally stated: Without prejudice to my former offer or tender heretofore made by me to you, or to any member of the above Order, I do hereby tender to you as Supreme Secretary, \$5.80, as provided by the constitution, by-laws, and by-lawment laws of the said Order, and as a member of said Order and of the suspended Court Maple, No. 4, I now respectfully apply to you for, and demand of you, the Supreme Court card, to which I am entitled as a member of said suspended Court Maple, No. 4, and request you to receive \$1.00 of such sum as the fee therefor. And I further apply to you for, and demand of you, the certificate or receipt authorizing the Chief Ranger of any Court to give me the password in force during the time in which such dues are paid, and I request you to receive \$2.00 as dues to which the Supreme Court is entitled in advance therefor, and the balance of the said sum of \$5.80 please to receive as assessments due by me to the said Order, for the months of August, September, October, and November. And I claim to be a member of the said Order in financial standing."

A later tender was also made by Mr. Simpson for Oates, which was also refused.

The plaintiff said in her evidence that the Chief Ranger, who is a doctor, knew of course her husband was in a consumption, and that her husband went over to the Canadian Order of Foresters, but he did not leave the other to do that. \$1,000 was paid by the Canadian Order about six months after his death. Oates was insured in three societies, in the Maccabees, and two Orders of Foresters, and the plaintiff had got \$62 from the Maccabees, and the Canadian Order had paid in full. The Maccabees had broken up. There were several persons who were members of both Orders.

Mr. Reid, the stepfather of the plaintiff, said he made the payments to the Order for Oates while he was away and until his return, and he was in good financial standing when he came home. Court Maple, to which Oates belonged, wished to join the other Order in a body, and to take their sick brother Oates with them. There was an arrangement the Order would take over the whole Court Maple, including the sick brother. He was taken with the rest. His situation was explained to them. They were seceders and glad to secede, and were leaving the Order. They were not in rebellion against the Independent Order. It was the Independent Order that was in rebellion against them. They were all leaving the Independent Order, and glad to get away from it. Oates wished to remain. Oates refused to leave the Independent Order. Some of the members leaving the Independent Order stipulated that he should be insured also in the Canadian Order, as a condition of their joining the Canadian Order. The last payment he (Reid) made for Oates was the 25th of August, 1882.

Henry Thompson, said: "I was financial secretary of Court Maple. Oates had to pay seventy cents a month to keep his endowment good. The last payment was the 25th of August, 1882. At that time Oates was in good financial standing. I seceded and joined the Canadian Order: a large number of Court Maple did so. Seceding members are members of both Orders."

George M. Brown was treasurer of Court Maple. He said the endowment payments he received he paid over to the Supreme Treasurer. He understood Oates was in good standing in Court Maple at the time of his last payment. The first default of Court Maple to the Supreme Court was in September.

The case was fully argued after the plaintiff closed his case, no evidence being offered for the defendants.

The learned Judge reserved the case, and subsequently delivered the following judgment:

October 20, 1883. PATTERSON, J. A.—This is an action brought by Emma Oates, the widow of Benjamin S. Oates, upon a policy of insurance upon the life of her husband.

The policy bears date 6th May, 1882. In consideration (amongst other considerations) of the statements and declarations contained in the obligation of Subordinate Courts, the Supreme Court of the Independent Order of Foresters agrees, *inter alia*, to pay to the widow, or orphans, or legal heirs of Benjamin S. Oates, who was admitted to the mysteries and privileges of the Independent Order of Foresters, in Court Maple No. 4, on 12th September, 1878, on due proof of his death, the sum of \$1000: Provided, *inter alia*, he shall be a member in good standing in the Order, according to the laws, rules, and regulations of the Supreme Court of the Independent Order of Foresters.

The only question which I did not dispose of is, whether at the time of the death of Oates, which occurred on 11th January, 1883, he was a member of the Order in good standing.

One of the provisions of the constitution, Art. 491, gives power to the Supreme Chief Ranger, during a recess of the Supreme Court, to suspend any Subordinate Court which shall refuse or neglect to make its returns or pay its dues to the Supreme Court; and further provides that any subordinate Court may be suspended, and the members thereof deprived of all benefit from the endowment or other funds, by the Supreme Chief Ranger, whenever such subordinate Court shall neglect or refuse to make its returns or fail to pay its assessments to the endowment or other funds.

Acting upon this power the Supreme Chief Ranger suspended Court Maple, and cut off the deceased and the other members of that Court from all benefit from the endowment fund.

In addition to the constitution there is an "Endowment law," enacted by the Supreme Court, which regulates the assessments to be paid by beneficiary members of the Order, and other matters concerning the insurance or endowment scheme. By section 14 of this law, members of the suspended Courts who were in good standing at the time of the suspension shall on application to the Supreme Secretary, if within thirty days, and on payment of a fee of one dollar, receive from the Supreme Secretary a Supreme Court card, and shall then be entitled to endowments, provided they pay the assessments to the Supreme Treasurer as they fall

due, provided they affiliate at the earliest practicable time with some subordinate Court; but if after thirty days, they must pass the usual medical examination, &c.

The deceased was in good standing when Court Maple was suspended. Within thirty days he wrote to the Supreme Secretary remitting \$1.70, and asking for a Supreme Court card. One dollar of the remittance was for the fee mentioned in sec. 14, and the seventy cents was for one month's assessment. It is, I think, perfectly clear that he was entitled to the card, and that under sec. 14 it was the duty of the Supreme Secretary simply as a ministerial act to send it to him. The seventy cents should properly have been sent to the Supreme Treasurer. The Supreme Secretary misapprehended his duty and returned the money, writing as his reason that he had no authority to receive the money and issue the card without a certificate from the Supreme Chief Ranger, to whom he directed Oates to make application.

This was on 15th September, 1882.

Oates thereupon applied to the Supreme Chief Ranger, and was informed by him, by letter dated 21st September, that it was necessary for him before he could be reinstated to pass a medical examination. He enclosed a form of medical certificate, which would make his letter, addressed to a man far advanced in consumption, seem a heartless pleasantry, were it not that he has himself furnished a pretext on which his good faith may be assumed, though at the expense of his acquaintance with the laws of his Order of which he was the chief administrator. In a subsequent letter, in which he reiterates the necessity for the medical examination and sends another form, he refers Oates to articles 246 and 262 of the constitution; but both of these refer to suspension of the member himself for some default upon his own part, in which case good bodily health is properly enough made a condition of restoration of benefits, and he overlooks, or at all events does not call the attention of his correspondent to sec. 14 of the endowment law, which was the rule applicable to his case.

The other correspondence with the Supreme Secretary, the Supreme Treasurer, and the Supreme Chief Ranger, shews everything done that could have been done on the part of Oates, in the way of tendering payment, to put himself in the right, and the persistent refusal on the part of the Supreme Chief Ranger to award to him the right which formed part of his contract.

The deceased even made efforts to affiliate with another subordinate Court, which failed for want of the card.

If it were necessary for the purpose of preserving the status of the deceased as a member of the Order in good standing, a decree might now be made for the issue of the card *nunc pro tunc*, and for doing all that ought to have been done by the Supreme Officers.

But I do not think that is necessary.

The deceased did all that was required on his part; and the defendants cannot be allowed to set up their own wrong, or the wrongful refusal of their officers to do their duty, as a reason for being relieved from their obligation.

Various questions were argued on behalf of the defendants on the assumption that the constitution required the deceased or the plaintiff to seek redress, either exclusively or before bringing this action, in the domestic *fora* provided by the constitution, as in article 59 and following articles, which deal with appeals.

None of those are applicable to the acts provided for by sec. 14 of the endowment law.

I do not think it necessary on this subject, or on the subject of payment of assessments by the deceased before the suspension of his Court, or on some other subjects on which points were made, to add anything to what I said at the hearing. I include in this observation the reference to the circumstance of the members of Court Maple, including the deceased, having as a body joined a rival Order of Foresters, which seems to have created a feeling which possibly led to this litigation, some parties having apparently assumed that they ceased *ipso facto* to have any longer rights against the defendants.

I give judgment for the plaintiff, with costs. She will have interest on the money payable under the policy from the date of proof of death, say from 1st March, 1883; but I am not sure that there may not be something to deduct from the \$1000 for money paid during sickness. The amount may be ascertained by the solicitors, and mentioned to me.

In the Michaelmas Sittings of the Divisional Court Osler, Q. C., moved, on notice, to set aside the finding, and judgment of the learned Judge who tried the case, and to enter the same for the defendants, or for a new trial, on

the grounds: 1. That the husband of the plaintiff did not exhaust all remedies as to the alleged cause of action by the rules of the defendants' Order. 2. That Court Maple, No. 4, was suspended by non-payment to the Supreme Court of dues payable before the death of the plaintiff's husband. 3. That the members of Court Maple, No. 4, were suspended in the lifetime of the plaintiff's husband. 4. That it was not shewn the plaintiff's husband had paid his dues to Court Maple, No. 4 in advance, as required by the laws of the Order. That an amendment was refused at the trial, setting up the fact that the plaintiff's husband had removed, without a permit to do so beyond the limits prescribed, whereby the defendants were released from all liability upon the said policy; and setting up also that the plaintiff's husband was during the currency of the policy guilty of conduct and rebellion against the rules of the defendants' Order, whereby the defendants were released from their liability: and 6. That the learned Judge rejected evidence in support of these defences.

During the same Sittings, December 12th, 1883, Osler, Q.C., proceeded to support his motion, whereupon *R. Meredith*, for the plaintiff, took a preliminary objection, that the Toronto solicitors on whom the service was made were not his Toronto agents, and filed affidavits in support of his contention.

Osler, Q.C., filed affidavits in reply, and to shew that the Toronto solicitors were the Toronto agents of the plaintiff's solicitor; and that the service was properly made on them.

Osler, Q.C., then proceeded to support the motion. The deceased did not exhaust every possible means of redress afforded by the internal regulations of the society, and where it so appears the Court will not interfere. Rule 59 shews the deceased should have appealed, through the seven different appellate bodies as therein provided, and he appealed to two of them only. The deceased also had forfeited all claim upon the defendants by

ing the rival Order. The lodge to which the deceased moved leave the Order in a body and join a new Order, their contributions are withdrawn from the Order. Part of the agreement of the lodge joining the new Order was, that the deceased, who was sick, should be taken over and added with the others. It certainly was the idea of every one that the deceased, equally with the other members leaving, had ceased to be a member of defendants' Order. The deceased, in joining the new and rival Order, were suspended by the defendants. The deceased was not a member of good standing so as to be entitled to the Supreme Court as it was proved he was in arrear; and further, he was not affiliated with any other Subordinate Court of the Order as required by the rules. The deceased also by moving beyond the prescribed limits without the required license, forfeited all rights under the endowment provisions. Amendments asked for at the trial to set up these facts would have been allowed. He referred to *Essery v. Court of the Dominion*, 2 O. R. 596; *Field v. Court of Ancient Order of Foresters*, 26 Gr. 467; *Dawkins v. Introbus*, 17 Ch. D. 615; *Thompson v. Planet Benefit Building Society*, L. R. 15 Eq. 333; and to section 175 of the constitution of the Order, defining "good standing," to sec. 14 of the "endowment law."

M. Meredith shewed cause. The deceased joined the Court Maples and another Order, both of them different Orders from that of the defendants, but that did not prevent him from still being a member of Court Maple No. 4. There were several instances of others doing the like. The difficulty shown in the way of the deceased getting his Supreme Court card and affiliation with another subordinate Court of the Order, was that he was in ill health and they were obliged to get rid of him. The defendants sent the policy for \$1000 a year, to Oates while he was in California, so they were not at that time he was in that country; and they never raised this objection until the trial was going on. The learned Judge rightly refused to amend. The deceased was not have affiliated with any subordinate Court to

present his claim on the endowment fund according to rule No. 175. The only question upon the pleadings is, whether Oates was properly required to pass a medical examination before he was entitled to the Supreme Court card. The Court, it is true, was suspended, but the members of such Court, by the same rule No. 49, "may protect themselves as provided in section 14 of the endowment law." There is no such rule as is pleaded in the twentieth paragraph of the statement of defence. If Oates should have appealed to all the different persons and Courts, as it is said he should have done, the defendants have not pleaded such a defence. The Supreme Secretary or other officer under section 14 of the endowment law, was bound to grant to the deceased the Supreme Court card, for the duty cast upon him was ministerial only. Rule 59 applies only to matters arising in the Court at which the Chief Ranger presides, for this appeal is from him to the same Court, and from his Court, &c. There could be no appeal to Court Maple for it was suspended.

Osler, Q. C., in reply. The plaintiff is not entitled to recover at all, as under the R. S. O., ch. 167, sec. 1 administration to the husband's estate should have been taken out; at all events the plaintiff can only recover the amount of \$500. This objection should, strictly speaking, have been taken on the opening, and therefore of course the plaintiff should have the right of replying to it.

Meredith. The objection cannot prevail, as by the endorsement given on the card, as well as by the statute she is the person entitled to receive it.

December 24, 1883. WILSON, C. J.—The preliminary objection need not be further noticed, as we think service was properly made upon the facts appearing on the affidavits filed in answer.

The endowment certificate is subject to the condition that Benjamin S. Oates at the time of his death "shall be a member in good standing in the Order according to the

laws, rules, and regulations of the Supreme Court of the Independent Order of Foresters."

If in addition to that specified condition, it was necessary that Oates should, under section 14 of the endowment law have got his Supreme Court card, and have affiliated at the earliest practicable time with some subordinate Court, the general averment that all conditions were fulfilled, &c., is a sufficient allegation that these acts had all been done and fulfilled.

It was proved that Oates was at the time of his death a member in good standing, and so far that condition was proved as alleged, but it was not proved he had obtained a Supreme Court card, nor that he had become affiliated to a subordinate Court of the defendants' Order, under section 14 of the endowment law, and it was not necessary the plaintiff should have proved these matters under that section, because they are impliedly covered by the general allegation of performance in the statement of claim, and the defendants have not traversed them, if they are to be considered as alleged, nor have they pleaded them as matters which were to have been performed as conditions precedent.

The plaintiff should as to the matters under section 14 properly have excused the non-performance of these conditions, because they never were in fact performed or complied with. They have not by either party been made any part of this action, and as the case is upon the pleadings, we have nothing whatever to do with them. The defendants have not even traversed the allegation that Oates was a member in good standing in the Order at the time of his death.

They have pleaded that the Court Maple No. 4, of which Oates was a member, was suspended, and the members thereof were deprived of all benefits, "whereupon Oates ceased to be a member of the defendants' Order, and he was never thereafter reinstated or admitted to membership, and at the time of his death as alleged in the statement of claim he was not a member of the defendants' Order."

is a denial of Oates having been a member in fact
time after the Court was suspended. It does not
his good standing, if he was a member in fact.

Rule No. 49, which relates to the suspension of
and the deprivation of members of such suspended
of all benefits from the endowment, or other
expressly provides that "individual members of sus-
d Courts may protect themselves as provided in sec-
14 of the endowment law," which shews plainly that
sion of the Court did not, as the statement of defence
es, cause "Oates to cease to be a member of the defen-
s' Order." And the section 14, also provides, as before
ed, in what manner "members of suspended Courts"
still preserve their right "to the endowment."

The statement of defence in that respect was therefore
only disproved.

The third paragraph of the statement of defence was not
ported in any respect.

The averment that, "whereupon Oates ceased to be a mem-
of the defendants' Order," if it is assumed to be an infer-
e of law, does not support the conclusion drawn, for
deprivation of the members of it of all benefits will not
essarily alone cause a cessation of membership in the
ler; and if it be a conclusion of fact, it is not warranted
the like reason, but it should have been shewn that the
s declared that in such a case membership was com-
tely determined, or determined at any rate during the
pension and deprivation of benefits. The pleadings
uld properly have been "whereupon Oates was deprived
the benefit of the endowment fund, and of the right to
sum demanded in the statement of claim." But the
ter tendered in issue is, whether Oates on the facts
ed was a member of the Order or not, not whether he
s deprived of the benefits or not, yet the plaintiff has
sed over the matter tendered for issue, and replied to
matter relating to the benefits of the endowment fund.
e plaintiff while replying should have set out the rule
the section of the laws, and have alleged the mean-
ns

~~T~~aken to get the benefit of the endowment fund, and that ~~t~~he defendants wilfully and wrongfully refused to the applicant the Supreme Court card, and thereby prevented him ~~f~~rom affiliating himself to one of the subordinate Courts. ~~A~~s it stands at present on the replication the allegation ~~“~~ that the Chief Ranger had no power to deprive absolutely members of a suspended Court from the benefits of the ~~e~~ndowment fund,” is matter of law, in place of a statement of fact from which the law can be applied and decided.

That really decides the case. The third paragraph of the reply was unnecessary. It asserts hypothetically that if re-admission of the deceased were necessary to constitute him a member of the Order, such re-admission was prevented by the wrongful acts of the defendants, but as an act of re-admission was not necessary to make the deceased a member, or to preserve his membership, the replication setting up that fact in the manner it is pleaded becomes of no consequence. If any effect be given to it, I think it was proved, for no medical examination was required to entitle the deceased to the Supreme Court card, and it was the want of the card alone which prevented his affiliation into another subordinate Court of the defendants' Order.

The amendment asked for to set up a forfeiture of the endowment certificate by reason of the residence of the deceased in California, even if there had been no permit, was wisely refused under the circumstances proved.

I am not sure that the way, cause, and manner in and for which the deceased and many others of the Court Maple, No. 4 left it and joined in a body a rival Order, might not have required some consideration if it had been pleaded properly, for the evidence shews these members were abandoning Court Maple, and taking the deceased along with them upon terms made with the rival Court, that the deceased should without medical examination have the like benefits in the funds of the new Court which he had in the old one, and it is quite clear he could not have been admitted into any other Court, but upon

some such special arrangement. But the defendants did not raise that objection while Oates was negotiating with them for his Supreme Court card, nor have they pleaded it.

As to the necessity of Oates appealing through all the Courts and functionaries of the Order against the refusal of the Chief Ranger or other official to grant the Supreme Court card, Rule 59 has no application whatever. Oates could not appeal from the Chief Ranger to the Court at the same meeting. That refers to proceedings in or at the meeting of the Court. However that may be, there was no Court to appeal to. The Court was suspended, and Oates was taking proceedings outside of the Court because it was suspended.

Oates was entitled to the Supreme Court card from the Supreme Secretary, and no appeal is provided for against his decision. The object of section 14 was to preserve the rights of members in good standing who were not in fault, although the Court was suspended, and to preserve them as of course and of right upon the conditions contained in section 14.

This proceeding has nothing whatever to do with the internal management or proceedings of the Order. It is a claim for a money demand, with which the Courts of law can alone deal in case of a refusal to pay it.

The plaintiff's case should, I think, have stated in the first instance the fact of suspension of the Court, &c., and that Oates made application under section 14 for the Supreme Court card, &c., and did all things necessary to obtain it, and was entitled to it, yet it was wrongfully refused to him, whereby he was prevented from affiliating, &c., and so excusing the non-performance of these precedent acts, and praying the allowance of the money claimed, as if Oates had obtained the card and had made the affiliation required. If these facts were stated at the outset, they should have been added by way of amendment.

The pleadings are very far from correct, but the facts and merits have been tried, and that may suffice.

Upon the case, as it is before us, the plaintiff is entitled to recover.

Then as to the amount to be recovered.

By the certificate of endowment, the \$1000 is payable on the death of Oates "to the widow, or orphans, or legal heirs of the said brother."

The widow now claims the whole sum, because upon the back of the certificate the deceased has endorsed as follows: "I hereby direct that the endowment benefit due at my death on this endowment certificate shall be paid to my wife, Emma Oates: (Signed), Benjamin S. Oates," and attested by two witnesses.

The R. S. O. ch. 167, sec. 11, enacts: "When, on the death of any member of a society, any sum of money becomes payable under the rules of the society, the same shall be paid by the treasurer or other officer of the society to the person or persons entitled under the rules thereof; and such money shall be, to the extent of five hundred dollars free from all claims by the personal representative or creditors of the deceased; and in case any sum is paid in good faith to the person who appears to the treasurer or other officer to be entitled to receive the same, no action shall be brought against such treasurer or other officer of the society in respect thereof; but nevertheless, if it subsequently appears that such money has been paid to the wrong person, the person entitled thereto may recover the amount with interest from the person who has wrongfully received it."

The "orphans" applies of course to the children of the deceased.

Under the direction so given to pay the money to the now plaintiff, she is entitled to receive it as well by the direction so given as by the statute, and the treasurer or other officer of the society who may pay it cannot avoid paying it in good faith to the person who appears to be entitled to receive the money if it is paid to the person expressly directed by the member to receive it. The society will be discharged by the payment made to the

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(a) This case was argued before Wilson, C. J., and Galt, J., ~~and Rose, Oslar, J.~~ having ceased to be a member of the Court on his appointment as Judge of the Court of Appeal, and the vacancy not having been ~~filled~~ filled.

[COMMON PLEAS DIVISION.]

MEEK V. SCOBELL.

Division Courts—Claim for damages and debt—Damages above jurisdiction—General abandonment—Prohibition.

The plaintiff sued in the Division Court on a claim which was originally composed of a solicitor's bill of costs, \$36.06; damages, \$69.33; due for advice, \$6; total, \$111.39. The plaintiff abandoned as to \$11.39, without specifying from what items he threw the amount off. The plaintiff, at the trial, agreed to take \$30 for the first item, and the learned Judge reduced the \$69.33 to \$62, the \$6 item was struck out, and the total then stood \$92.33. This sum was further reduced to \$80, for which judgment was entered.

Held, affirming the judgment of Wilson, C. J., that prohibition was properly directed; that the abandonment being general, it could not be assumed that the plaintiff had made a reduction in his demand for damages, so as to give the Court jurisdiction; and even if the Court had power to confine the prohibition to the claim for damages, it could not be done here, for it did not appear how much of the \$80 was applicable to such claim.

The nature of the claim, as appearing on the summons, is the claim recognizable on a motion for prohibition.

This is an appeal from the judgment of Wilson, C. J.

Ordering a writ of prohibition to issue.

The facts were as follows:

The plaintiff sued in the Tenth Division Court of the County of York for the following claims:

| | |
|--|----------|
| For costs, as per bill rendered | \$36 06 |
| For amount secured by chattel mortgage on the goods, &c., in the store No. 112½ King street west, which the defendant purchased from one Shepard (the mortgagor), and which were sold under a landlord's warrant for rent due by the defendant for the said premises | 62 00 |
| For fee, advising defendant as to his dissolution of partnership, at various times | 6 00 |
| | <hr/> |
| | \$104 06 |

The defendant's defence was:

1. A denial of the plaintiff's claim.
2. That the Court had no jurisdiction over the matters in dispute; and

3. He pleaded the provisions of R. S. O. ch. 130 respecting attorneys-at-law.

The item of \$62 stood in the account
sued upon as \$69.33, and the
Judge at the trial made it \$62.
As it stood at first the total
amount was..... \$111 39

And there was written at the foot:
Plaintiff abandoned 11 39

\$100 00

At the trial the amount abandoned was
deducted from the \$104.06 after the above
alteration was made in the claim; thus .. 11 39

Which left as the sum claimed \$92 67

The evidence shewed the plaintiff had agreed to take \$- 30
for the first item of \$36.06, and he did not prove a bill h ad
been rendered for the last item of \$6, and it was struck o t.
The deduction was made from the \$92.67 of \$12.67, and a
verdict was given for the plaintiff for \$80, besides cost.

A summons on behalf of the defendant was thereupon
obtained from a Judge in Chambers calling upon the plain-
tiff to shew cause why a writ of prohibition should not
issue to prohibit the Judge of the Division Court of the
County of York from further proceeding in this plaint,
upon the grounds that the said Court has no ju ris-
diction to hear or determine the same, as the plaintiff's
claim is for the sum of \$100, and it appears that \$69, a por-
tion of it, is for damages arising from a sale of goods under
a landlord's warrant, and as the plaintiff has joined to a
claim of \$60 and upwards for damages a further claim for
debt.

The summons was subsequently argued before Wilson,
C. J., who delivered the following judgment :

WILSON, C. J.—The argument against the jurisdiction
was :

1. The claim for damages, to which the item of \$62
relates, cannot be joined with a claim for debt or for the

payment by contract of money, goods or labour: 2. The claim for damages cannot be joined with any other demand, the claim for damages is for a sum of \$60 independently of the other claim for debt, &c.: 3. The plaintiff was suing for a claim for damages amounting to \$62, and in excess of the jurisdiction of the Court, which has no cognizance of claims for damages only to the extent of \$60: 4. The total claim being \$92.67, composed of the three items: \$36.06, \$62, and \$6—\$104.06, less the sum abandoned of \$11.39—it does not appear the \$11.39 abandoned was in reduction of the \$62 for damages, and unless it plainly appears on the face of the summons or other proceedings in the cause, it is not to be assumed the abandonment was in respect of the claim for damages so as to confer jurisdiction, for the fact of jurisdiction must distinctly appear upon the proceedings in Courts of inferior jurisdiction, otherwise the fact of jurisdiction will not be presumed.

The jurisdiction of the Court extends to: 1. All claims in personal actions (excepting those specially excepted in section 53) when the amount claimed does not exceed \$60:

All claims for debt when the amount or balance claimed does not exceed \$100; and 3. All claims for debt or money when the amount or balance of which does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendant.

But when the unsettled account exceeds in the whole \$200, the claim is not cognizable by the Court.

It is not necessary to say whether I agree with *Vogt v. Boyle*, 8 P. R. 249, or not. The largest sum which can be recovered in the Division Court is \$200, and that is when the amount, or the original sum of which it is a balance, is ascertained by the signature of the debtor. If, in addition to the \$200, a further claim not exceeding \$100, not liquidated, can also be recovered, that is increasing the jurisdiction to \$300; and if, in addition to that sum, \$60 can also be recovered for a trespass, the jurisdiction will be enlarged to \$360.

For the disposal of this case it is sufficient to determine merely whether the claim of \$62 for damages, being in excess of the \$60 authorized to be sued for, can be considered as reduced to \$60, or below that sum, by reason of the plaintiff having reduced his whole claim for that and other demands by his abandoning the sum of \$11.39; and I am of opinion it cannot be assumed he has reduced his

demand for damages, as there are other claims for and in respect of which such abandonment may presumably be applied, as well as to the particular demand of the \$62.

I must, therefore, make the order for prohibition, with costs to be paid by the plaintiff to the defendant.

From this judgment the plaintiff appealed to the Divisional Court.

The plaintiff in person supported the motion, and referred to Division Courts Act, R. S. O. ch. 47, sec. sub-sec. 2; *O'Brien's Div. Courts Act* of 1879, p. 43-8, 468, 469, 473; *Sinclair's Div. Courts Act*, p. 53-64; *Carlsake v. Mapledoram*, 2 T. R. 473; *Walsh v. Ionides*, 1 E. & B. 383; *Kerkin v. Kerkin*, 3 E. & B. 399; *Fitzsimmons v. McIntyre*, 5 P. R. 119, *Re Higginbotham v. Moore*, 21 U. C. R. 326; *Bridges v. Douglas*, 13 L. J. N. S. 358; *Stephens v. Laplante*, 8 P. R. 52; *Vogt v. Boyle*, 8 P. R. 249; *O. J. Act*, secs. 77, 78; *Chambers v. Green*, L. R. 20 Eq. 552; *Horwood on Prohibition*, 116; *Re Ricardo v. Maidenhead Local Board of Health*, 2 H. & N. 257; *Morris v. Cameron*, 1 C. P. 422; *Re Stogdale and Wilson*, 8 P. R. 5.

A. C. Galt, contra, in addition to the cases above referred to, cited *Re Mackenzie v. Ryan*, 6 P. R. 323.

The arguments sufficiently appear from the judgment.

December, 24, 1883. ROSE, J.—It is clear from the case of *McKenzie v. Ryan*, 6 P. R. 323, that the abandonment must be in the first instance on the claim. See Rule 69 of the Division Court Rules of 1854; Rule 8 of 1869; *Sinclair D. C. Act*, p. 240, in the following terms: "Where the excess is abandoned, it must be done, in the first instance, on the claim."

The abandonment in this case on the claim was of \$11.39 on items amounting to \$111.39, say 10 per cent. If the abandonment is applied on the first item, the second remains over \$60, i. e., \$69.33. If proportionately on three, the second remains \$62.40. If applied on the first two the result will be about the same, as the third item only \$6. Unless therefore a further abandonment which

took place at the trial of \$7 from the \$69 assists the plaintiff the Court clearly had no jurisdiction to entertain and try the claim as to the second item, it being one which is brought under the first of the three classes of claims provided for by the statute, *i. e.*, "All claims in personal actions where the amount claimed does not exceed \$60."

For the reason above given we think the second abandonment could not be made at the trial.

The plaintiff urges that it manifestly appears that the learned Judge at the trial applied the abandonment on the \$62 item. There is nothing shewing us that this is so and, if he did, we are not of the opinion that he had power so to do.

The plaintiff says that though the claim shews that the second item comes within the first class of cases mentioned in the statute, the evidence shewed that it came under the second class, where the jurisdiction is limited to \$100, and urges that prohibition to an Inferior Court should not be granted, unless it is clearly made to appear that under no view of the facts has the Inferior Court jurisdiction.

Admitting the law to be as claimed by the plaintiff, we think it would not warrant us in going behind the claim as made by the plaintiff on his summons, which was not amended at the trial (if such power to amend existed), and investigating the evidence offered to find that the claim, as made on the summons, was not well founded, but some other claim was proven which the plaintiff has not made. We think on this motion we must take the claim to be of the nature appearing on the summons.

We are then asked to confine the prohibition to the second item. This we would do if we saw our way clear to such a course. We have referred to *Fitzsimmons v. McIntyre*, 5 P. R. 119, and the cases there cited of *Walsh v. Ionides*, 1 E. & B. 383, and *Kerkin v. Kerkin*, 3 E. & B. 398. These two latter cases were prohibitions before trial, and the prohibition being confined to the claim complained of, the trial could well proceed as to the claims within the jurisdiction. Here the order is after trial, and

the judgment is for one sum, embracing two or more claims. How can we say what part of the \$80 is made up of the amount allowed on the second item? *i. e.*, how much has been allowed on the second item? To what sum therefore should we confine the prohibition? If we confine the prohibition to the second item, what application should be made of the \$11.92?

In *Fitzsimmons v. McIntyre* the prohibition was refused as the learned Judge at the trial had expunged from the record the count complained of. The learned Judge (Mr. Justice Gwynne) who gave judgment points out the provision in the C. L. P. Act for joining in one action several and distinct causes of action. It may be that the provisions of the Judicature Act, Rule 115, allow several causes of action to be joined in the Division Court, and that therefore, if one of the several is beyond the jurisdiction, the Judge may strike it out and proceed with the trial of the others. This has not been done here, and we are not, therefore, required to express an opinion on the point raised and discussed before us as to such power to join the three several causes of action provided for by the statute. Without expressing any opinion on this point, we think it would be well, in any case coming before the Division Courts in which one of several items appears beyond the jurisdiction of the Court, to strike it out, so as not to endanger the rest of the claim by a general judgment embracing the doubtful item.

If this were done, and prohibition were applied for, on the ground that such a joinder ousted the jurisdiction of the Division Court, an appeal to the discretion of the Court might be successful in obtaining a judgment similar to that given in *Fitzsimmons v. McIntyre*.

In our opinion the appeal fails, and we fear must be dismissed, with the usual penalty of costs.

WILSON, C. J., and GALT, J., concurred.

Appeal dismissed.

[COMMON PLEAS DIVISION.]

REGINA V. MATHESON.

gambling—Playing at Pharaoh—Conviction—Civil action—12 Geo. II. ch. 28, 27 Geo. III. ch. 1, sec. 2.

The defendant was convicted by the Police Magistrate of the City of Toronto for playing at a game of cards called Pharaoh, contrary to the statute 12 Geo. II. ch. 28, and sentenced to pay £50 sterling, the penalty thereby imposed, and, that under 27 Geo. III. ch. 1, sec. 2, the jurisdiction of Justices of the Peace in such cases was taken away, and in lieu thereof the recovery of such penalty was to be by civil action.

The conviction was therefore quashed.

Held, Per Wilson, C. J., that the defendant could have been convicted under the Municipal Act, 46 Vic. ch. 18, sec. 49, sub-sec. 33, against gambling, and he by-law passed with reference thereto.

THIS was an application to quash a conviction made by the Police Magistrate, under 12 Geo. II., ch. 28: "An Act for the more effectual preventing of excessive and wasteful gaming."

The information was laid by the deputy chief constable, and alleged that the defendant did unlawfully play, set at stake, and punt, at a certain unlawful game of cards, to wit, the game of pharaoh, against the form of the statute."

The defendant was convicted and sentenced to pay £50 stg., or be imprisoned for ten days.

During Michaelmas Sittings, November 3, 1883, *McMichael*, Q.C., and *Bigelow*, supported the motion. The jurisdiction of Justices of the Peace to convict persons playing at Pharaoh and other games, by 12 Geo. II ch. 28, and impose the penalties thereby given, was taken away by 27 Geo. III ch. 1, sec. 2, which provided that the penalties were not to be recoverable before any Justice of the Peace, but should be sued for by action of debt, bill, plaint, suit, or information, in any of His Majesty's Courts at Westminster. The remedy must therefore be by action, and the conviction is therefore clearly bad. The case of *ex v. Liston*, 5 T. R. 338, which decides otherwise, has been overruled by *Regina v. Tuddenham*, 9 Dowl. 937. It is not shewn that the game "Faro," played by defendant

was the same game as "Pharaoh," prohibited by 12 Geo. II ch. 28. The game which the defendant was convicted of playing was Faro, and it is so designated in the dictionaries: *Latham's Dictionary*, tit. Faro: *Encyclopædia Britannica*, tit. Faro.

Fenton, County Crown Attorney, contra. The case of *Rex v. Liston*, 5 T. R. 338, expressly held that the 27 Geo. III ch. 1, only applied to State Lotteries, and a reference to that Statute and the Acts to which it refers confirms this decision. This decision was given within six years after the 27 Geo. III was passed, and while its intent and scope was fresh in the recollection of the Court. The case of *Regina v. Tuddenham*, 9 Dowl. 937, was decided forty-eight years afterwards, and the *ratio decidendi* of *Wightman, J.*, is erroneous. He bases his judgment upon the ground that the Court in *Rex v. Liston*, were wrong in deciding that 27 Geo. III ch. 1, applied only to public lotteries, and quotes 8 Geo. I ch. 2, recited therein as applicable to private lotteries. Now a careful examination of the latter Act will shew it applies to state lotteries and *Wightman, J.*, was evidently misled by its title. The case of *Regina v. Tuddenham*, too, was not a decision under 27 Geo. III ch. 1, but under a somewhat analogous later Act, 46 Geo. III ch. 148, sec. 59. Besides, the 27 Geo. III ch. 1, does not repeal other Acts *in pari materia* with 12 Geo. II ch. 28; for example, 13 Geo. II ch. 19, which declares "Passage" and other games with dice to be within the former Act; and 18 Geo. II ch. 34, which enacts that "roulet, or roly poly, and any game with cards or dice already prohibited by law," shall be punishable in the manner directed by 12 Geo. II ch. 28. Of its own strength, the 18 Geo. IV ch. 34, not being affected by 27 Geo. III ch. 1, sustains the present conviction: *Stephens's Digest*, Cr. Law Note XII, Appendix. As to the distinction between games and lotteries, see *Bishop on Statutory Crimes*, 2nd ed., 857-8, 861, 951-2. See *Regina v. Crawshaw*, 8 Cox C.C. 375, 1 Bell C.C. 303, as to the interpretation of analogous Acts, 10 & 11 Wm. III ch. 17, sec. 1. As to the meaning of

The word pharaoh the dictionaries shew that pharaoh and faro are identical: *Chambers's Encyclopedia* tit. "Faro;" *Oxford's Dictionary*, tit. faro. It is not necessary or possible to prove that the defendant played this game of pharaoh in the same manner in which it was played in 1839, when 12 Geo. II. ch. 28 was passed. The Court will assume it is the game prohibited by that statute, there being no evidence to the contrary.

February 9, 1884. GALT, J.—The statute in the recital, which is very voluminous, sets out, among other things:

And whereas several persons have for many years past carried on and set up certain fraudulent games and lotteries, to be determined by the chance of cards or dice, under the denomination of the games of the ace of hearts, pharaoh, basset, and hazard, and thereby defrauded several of His Majesty's subjects. * * And whereas several doubts have arisen, whether the said games of the ace of hearts, pharaoh, basset, and hazard are within the description of the lotteries prohibited by the said recited Acts of Parliament." The Act then goes on to enact that all persons who set up lotteries under any of the names or devices set out in the Act shall forfeit the sum of £200. The above mentioned games are not included in this section, but by the 2nd section it is enacted: "That the said games of the ace of hearts, pharaoh, basset, and hazard are, and are hereby declared to be games or lotteries by cards or dice within the intent and meaning of the said in part recited Acts," &c.

The meaning of this is, that the above specified games shall be treated and considered to be lotteries by cards or dice, within the intent and meaning of the statute, so as to subject persons offending against the statute to "be prosecuted and convicted, and the penalties and forfeitures shall be sued for and recovered in like manner, as the said penalties and forfeitures are by this Act directed to be sued for and recovered," &c.

The 3rd section, under which the defendant has been convicted, is: "That all and every person and persons,

who shall be adventurers in any of the said games," &c., "or shall play, set at stake or punt at either of the said games of the ace of hearts, pharaoh, basset, and hazard, and shall be thereof convicted in such manner and form as in and by this Act is prescribed; every such person or persons shall forfeit and lose the sum of fifty pounds, to be sued for and recovered, as aforesaid."

The first section had reference to persons setting up lotteries or games, the penalty for which was £200, and the third section to persons playing at such games, the penalty for which was fifty pounds, but both classes were to be proceeded against in the same manner, that is to say, "upon being convicted thereof before any Justice of the Peace," &c., one-third of the penalty to be paid to the informer, and the remaining two-thirds to the use of the poor of the parish where such offence shall have been committed.

It is plain, therefore, that in this case it was the intention of the Legislature that the information should be laid by any person who chose to come forward as an informer.

This statute remained in force for nearly fifty years, when the Act of 27 Geo. III., ch. 1: "An Act to render more effectual the laws now in being for suppressing unlawful lotteries," which, in the first section, after referring among others to the above Act, recites: Whereas "many good and wholesome provisions are enacted, which require to be maintained and carried more effectually into execution: And whereas great difficulties have arisen upon the methods of conviction of offenders against the said recited Acts, before Justices of the Peace, and many evasions of the said recited Acts are daily put in practice, for remedy, whereof" be it enacted "that all and every the said recited Acts, and every article and thing in them contained touching and concerning lotteries, and not by this Act altered or repealed, or other provision made in lieu thereof, shall be duly put in execution according to the tenor of the said recited Acts, and under the penalties

therein contained, to be raised, levied, and disposed of, as in and by this Act is directed."

Sec. 2 then enacts: "That, from and after the day on which this Act shall receive His Majesty's Royal assent, no pecuniary penalty or penalties which shall be incurred by any person or persons offending against such parts of the said Acts, or any of them, as touch and concern lotteries shall be recovered or recoverable before any Justice or Justices of the Peace, but shall and may be sued for" in any Court of Record at Westminster, and one-half of the penalty shall go to the use of His Majesty, and the other with full costs of suit to the person who shall sue for the same.

It is to be observed, as already mentioned, that by sec. 2 of 12 Geo. II., the games therein mentioned are expressly declared to be lotteries by cards or dice. It therefore appears to me that they must be so considered in reading the provisions of the Act of 27 Geo. III., and consequently that the jurisdiction of the Justices of the Peace to enforce the penalties is taken away.

I am aware that the case of *Rex v. Liston*, 5 T. R. 328, is opposed to this opinion, but, as was said in the case of *Regina v. Tuddenham*, 9 Dowl. 937, by Wightman, J., at p. 942: "That decision is, I confess, an extraordinary one to my mind." The case there referred to appears not to be reported anywhere.

There have been numerous statutes passed in England since that case was decided by which the law respecting illegal lotteries, has been allowed, but as they are not in force in this Dominion we are without authority beyond the case of *Regina v. Liston*; and in *Regina v. Tuddenham's* case, Wightman, J., expresses a strong doubt as to "whether the Court would now arrive at the same conclusion."

I have carefully considered the two statutes, and as I am of opinion the 27 Geo. III. covers this case, I think this motion should be made absolute to quash the conviction.

WILSON, C. J.—The purpose of the 27 Geo. III., ch. 1, was to put an end to prosecutions for gaming, prohibited by the 12 Geo. II., ch. 38, being carried on before Justices of the Peace, because “great difficulties have arisen upon the methods of conviction of offenders against the said recited Acts before Justices of the Peace, and many evasions of the said Acts are daily put in practice.” and by sec. 2 of the first mentioned Act it was expressly enacted that “no pecuniary penalty or penalties which shall be incurred by any person offending against such parts of the recited Acts, or any of them, as touch and concern lotteries, shall be recovered or recoverable before any Justice or Justices of the Peace,” but shall be sued for by any person “by action of debt, bill, plaint, suit, or information, in any of His Majesty’s Courts of Record at Westminster.”

That has not been done, but the defendant has been prosecuted for and been convicted by the Police Magistrate of this city under the 12 Geo. II ch. 28.

I quite agree with the judgment of my brother, Galt, and I think we are quite warranted by the decision in 9 Dowl. 937 in quashing this conviction, notwithstanding the case in 5 T. R. 338.

There is provision in the Municipal Act, 46 Vic., ch. 18, sec. 49, sub-sec. 33, against gambling, which has been in force for many years, and I believe there is a by-law in force applicable to a case like this, under which the defendant might have been prosecuted.

The order will be absolute quashing the conviction. (a)

(a) This case was argued before Wilson, C. J., and Galt, J., Oleson, J., having ceased to be a member of the Court on his appointment as Judge of the Court of Appeal, and the vacancy not having been then filled.

[COMMON PLEAS DIVISION.]

SUTHERLAND V. PATTERSON.

Guarantee—Promissory note.

On 11th June, 1877, defendant wrote to the plaintiff that J. S., the person he wished to assist, "informs me now that I could help him by pledging myself to you that you might give him a letter of credit in Montreal, and I now say, if you will assist him in that way to \$7000 or \$8000 that I will become responsible to you for the like amount in any manner you may wish. &c." J. S. then applied to the plaintiff, who gave a continuing guarantee in his favour to some Montreal merchants, dated 28th August, for goods to the extent of \$5000, for three years. At the same time the following note signed by the defendant in blank was filled up by J. S. : "Three years after date I promise to pay to the order of J. S. \$5000 &c." "Value received" To which was added. "This note is given as collateral security for a guarantee of \$5000 given to J. S. by A. S.," the plaintiff. No notice was ever given to defendant of the plaintiff's guarantee, or of the form in which the note was filled in. In an action on the defendant's letter as a continuing guarantee; and on the note.

Per WILSON, C. J.—The letter was a guarantee, but not a continuing one, and there could be no recovery under it as the evidence shewed that the amount of \$5000 secured thereby had been paid.

Per GALT, J., agreeing with the judgment of BURTON, J. A., at the trial, it was not a guarantee, but merely a proposition leading up to a guarantee; at all events if a guarantee it was not a continuing one.

Held, also, that the note was not a negotiable promissory note, not being made payable absolutely and at all events, but only as collateral security for plaintiff's guarantee.

THIS action was tried before Burton, J. A., without a jury.

The statement of claim alleged first, a claim on a promissory note for \$5,000, and second, a promise that if the plaintiff would assist one John Sutherland to procure a sum of money not exceeding \$8,000, he, the defendant, would be responsible to him for any sum not exceeding that amount.

There were a number of grounds of defence set out, but it is unnecessary to detail them.

It was proved that on the 11th June, 1877, the defendant wrote a letter dated in Michigan, to the plaintiff, as follows :

"I have frequently said to our mutual friend, John" (meaning thereby one John Sutherland), "that at any time I could be of assistance to him in business he was at liberty to give me a call, and he informs me now that I could help him by pledging myself to you, that you might give him a letter of credit in Montreal; and I now say, if you will assist him in that way to seven or eight thousand dollars, that I will become responsible to

you for the like amount in any manner you may wish, as I am fully satisfied that John will protect and take care of any one who would be generous enough to assist him."

The person mentioned in that letter applied to the plaintiff, but it did not appear at what time, and obtained from him a letter dated 28th August, 1877, but whether it was actually written on that day or the 29th, did not appear very clearly.

The letter was as follows:—

"MESSRS. JAMES JOHNSTON & Co., MONTREAL.

"Gentlemen:—

"I hereby guarantee to you payment for any goods sold by you John Sutherland, to the extent of \$5,000. This is to be a continuing guarantee for three years from date of first sale.

"Yours,

"A. SUTHERLAND."

At the time when the plaintiff gave this guarantee, he received from John Sutherland a promissory note signed by the defendant. It must have been in blank, for the defendant was not present, and the plaintiff swore it was filled up and given to him by Sutherland at the same time as he signed the guarantee. It was as follows:—

"BELLEVILLE, AUGUST 29TH, 1877—\$5,000.

"Three years after date I promise to pay to the order of John Sutherland \$5,000, at the office of Mr. A. Sutherland, Canifton, value received. This note is given as collateral security for a guarantee of \$5,000 given to John Sutherland by Alexander Sutherland.

"R. PATTERSON."

The learned Judge directed judgment in favour of the defendant, as follows:

BURTON, J.—It is clear the plaintiff is not entitled to recover upon what is described in the claim as a promissory note. The money referred to in it is not payable at all events, but the party taking it would have to enquire into an extrinsic fact to ascertain whether it was payable. The enquiry therefore is confined to the plaintiff's right to recover upon the guarantee.

The defendant contends that the letter of the 11th June, 1877, was not in itself a complete guarantee, but

he promise that if he complied with his request he, on being notified, give him a guarantee in such as he desired; and secondly, that the letter given by plaintiff to Johnson & Co., did not fall within the terms of the guarantee, which was to indemnify the plaintiff in event of his granting to John Sutherland a letter of credit on Montreal: that the letter given was not a letter of credit, but a continuing guarantee for three years. The terms of the defendant's letter to the plaintiff, are: "He," that is the person whom he wished to assist, informs me now that I could help him by pledging myself, that you might give him a letter of credit in Montreal, and now say that if you will assist him in that way to the amount of eight thousand dollars, that I will become responsible to you for the like amount *in any manner you may*

plaintiff never replied to the letter, but in the month of August following gave to John Sutherland a letter to James Johnston & Co., of Montreal, to guarantee payment of any goods sold by them to John Sutherland to the extent of \$5,000, the same to be a continuing guarantee for three years.

At the time that this was given, John Sutherland procured a blank note signed by the defendant, which he filled up with a like amount, and is the document I have first referred to, but this does not carry the case any further, as there is no evidence that the defendant was aware of the purpose for which it was applied, nor does it appear under what circumstances it came into the possession of John Sutherland.

We are driven, therefore, to consider whether the letter was a complete guarantee in itself, or a mere expression of willingness to come under such an obligation. The letter was not binding at first, and was revocable when acted upon by the plaintiff; but the question is, did it become binding even if acted upon, without some notice to the defendant of his willingness to become liable, or some further act necessary.

I am unable to distinguish this case from *McIver v. Davidson*, 1 M. & S. 557, and must, I think, regard this as a perfect and conclusive guarantee, but only as a condition tending to a guarantee: that is, if you will let me give the letter of credit he wishes, I will be obliged to become responsible by giving such a letter of credit as you will be satisfied with.

I incline to think the defendant puts too narrow construction upon the meaning of the words, "letter of credit," but in the view I take of the other point it is unnecessary to express any opinion upon it.

I enter judgment for defendant, with costs.

In Michaelmas sittings, *Bethune*, Q. C., moved on notice to set aside the verdict for the defendant and to enter a verdict for the plaintiff on the law and evidence.

During the same sittings, *Bethune*, Q. C., supported the motion. There are two questions raised here: 1, Whether the letter of the 11th June constituted a good guarantee; and 2, Whether the note sued on constituted a valid promissory note. The learned Judge on authority of *McIver v. Richardson*, 1 M. & S. 557, held that this was not a complete guarantee, but merely a proposition tending to a guarantee. It is, however, a good guarantee, as it contains a present promise to pay. It is also a continuing guarantee: *Jones v. Williams*, 7 M. & W. 493. Then as to the note. It is a valid note. It is payable at all events. The condition as set out in the note does not take away from its character as a note. There is nothing to prevent a note being taken as collateral security, and the mere statement of that fact in the note cannot deprive it of its character as a note: *Wise v. Charlton*, 4 A. & E. 786; *Farncourt v. Thorne*, 9 Q. B. 312; and these cases have never been overruled. The case of *Hall v. Merrick*, 40 U. C. R. 566, in our own Court, is relied on as shewing the contrary; but the cases above referred to do not appear to have been cited. In an event the note may be looked at as evidence of the guarantee.

Northrup, (of Belleville), contra. As to the guarantee. The words used in the letter, namely, "letter of credit," are entitled to much greater weight than the learned Judge attributed to them. The letter merely provided for the giving of a letter of credit. A letter of credit has a well-known legal signification, namely, an order to put money to a man's credit. If, therefore, the letter is looked upon

as merely a letter of credit, and had been acted upon as such, and the money placed by defendant to John Sutherland's credit, the evidence shews that it has long since been paid. Here, instead of giving a letter of credit, the defendant gave a continuing guarantee. The letter does not amount to a guarantee, as pointed out by the learned Judge, but merely a proposition which might result in a guarantee. It certainly was necessary that the defendant should have been notified that the plaintiff accepted it as a guarantee and intended to act upon it as such: *McIver v. Richardson*, 1 M. & S. 557. It cannot be construed as a continuing guarantee. If looked upon as a guarantee for a sum of \$5,000, and not a continuing guarantee for that sum, the evidence shews that that amount has been paid. The case of *Kastner v. Winstanley*, 20 C. P. 101, is conclusive in the defendant's favor. Then as to the note. This is clearly not a valid note. The condition annexed to it takes away from it its absolute character and thus deprives it of the essential requisite of a note. Before any liability could attach under it, John Sutherland must make default in payment of the amount guaranteed, and the plaintiff must make payment of same. *Hall v. Merrick*, 10 U. C. R. 566, is conclusive on this point. The note cannot be looked upon as a guarantee itself: *Hall v. Merrick*, 40 U. C. R. 566; nor as evidence of the guarantee. The evidence shews that the note was signed by the defendant in blank, and the manner in which it was filled in, namely, without any notice to the defendant, cannot be looked at to give effect to the defendant's intention in writing the alleged guarantee.

Bethune, Q. C., in reply. The term "letter of credit," is not used in the technical sense of a letter of credit given by a bank, but must be considered in the light of the fact that it was given to a merchant, a person not in the position to give a letter of credit, and to be used by him in such capacity.

THE ONTARIO REPORTS, 1884.

February 9, 1884. WILSON, C. J.—The letter of the 11th June, 1877, is, according to my reading, a guarantee, not a continuing guarantee, and as the goods supplied to the persons to whom the plaintiff after the date of that letter gave his own guarantee, far exceeded the amount of the sum guaranteed, and as the debtor has paid back of these advances much more than the sum guaranteed, the plaintiff has no claim against the defendant in respect of that letter.

The document filled up by the plaintiff in the form of a promissory note is not recoverable as a note, because it reads as a contract by which the money is not payable absolutely and at all events, but is only a collateral security for a guarantee given by the defendant to the plaintiff; and the guarantee referred to not being a continuing security has been discharged, paid, and satisfied, as before stated, long ago.

According to the terms of the letter the plaintiff had no right to make the note payable at three years if it was intended by so doing to make the transaction a continuing guarantee, but if it was made payable at three years, meaning to make that document and period of time have relation to the original sum advanced upon the letter of guarantee then that document filled up as a note has been paid and satisfied because the sum guaranteed has been paid off and satisfied.

For these reasons the motion should be dismissed, with costs.

GALT, J.—The guarantee sued on is said to have been contained in the letter of 11th June, 1877. The learned Judge in his considered judgment held that this case was not distinguishable from *McIver v. Richardson*, 1 M. 557.

The letter itself was not in my opinion itself a guarantee. It was, as in that case, a promise that if the plaintiff assisted John Sutherland by giving him a letter of introduction the defendant would become responsible to him.

like amount "in any manner you may wish." No notice was ever given to the defendant that such a guarantee had been given or his blank note filled up as collateral, and he was never consulted by the plaintiff, nor did he ever execute any instrument to indemnify the plaintiff, unless, indeed, the fact that John Sutherland filled in the blank note can be so considered, and if so, the only claim the plaintiff has on the defendant is on the note.

I quite agree, however, in the judgment of the Chief Justice, that if the letter was a guarantee it was not a continuing guarantee.

It is plain for the reasons given by the learned Judge the note is not a negotiable promissory note, and, moreover, it was in its circumstances very similar to the case of *Hall v. Merrick*, 40 U. C. R. 566, and on the authority of that case and the cases therein cited we hold the plaintiff cannot recover in this action (a).

Motion dismissed, with costs.

(a) This case was argued before Wilson, C. J., and Galt, J., alone, Oaker, J., having ceased to be a member of the Court on his appointment as Judge of the Court of Appeal, and the vacancy not having been then filled.

[CHANCERY DIVISION.]

SWAINSON V. BENTLEY.

Will—Construction—Gift of maintenance “while donee remains at home.”

A testator devised certain lands to his two sons, declaring that the legacies thereafter mentioned should be a charge thereon. He then bequeathed certain pecuniary legacies to his daughters, adding, “I give and devise also unto [his said daughters] their support and maintenance so long as they, or either of them, remain at home with [his two sons];” and he gave his personal property to his two sons in equal shares.

Held, that the support and maintenance of the plaintiffs was, by the will, made a charge upon the lands; and they might for sufficient reason, cease to live at home, and yet still be entitled to such support and maintenance.

THIS was an appeal from the report of the Master at Whitby. The circumstances of the case are fully set out in the judgment.

The appeal came up for argument on September 14th 1882, when it was enlarged to allow of a certificate being obtained from the Master as mentioned in the judgment.

On September 21st, 1882, it came up for final argument, and it was agreed the cause should be heard on further directions at the same time, to save expense.

The evidence before the Master went to shew that while the plaintiffs Martha Swainson and Matilda Swainson remained at home they were not properly fed, and clothed, and suffered privation.

S. H. Blake, Q.C., for the appellants. The infants who left their home were obliged to do so, and the lands are liable for their support. The principle is the same as in *Griffith v. Paterson*, 20 Gr. 615. The Master was wrong in assuming that the maintenance should be out of the rents and profits only.

Rae, for the respondents. The plaintiffs have suffered no greater privations than their brothers. Moreover the guardian should have applied long ago, and had part of the lands sold to support the infants. Again the income is

prima facie the fund liable for maintenance; the *corpus* is not resorted to, until the income fails. The Master, therefore, was right.

S. H. Blake, Q.C., we have nothing to do with the guardian. The infants should be allowed, at any rate \$12.50 a year for the six years past making \$225, and \$50 a year each until twenty-one, and costs of the litigation. I refer to *Robson v. Jardine*, 22 Gr. 420, and cases cited therein, and to *Hesp v. Bell*, 16 Gr. 412.

September 21st, 1882. FERGUSON, J. — This is an appeal from the report of the Master at Whitby. The plaintiffs are Matilda Swainson, Eliza Swainson, and Martha Swainson, who are infants, and sue by Solomon Stolleit, their next friend, who is also their testamentary guardian and executor of the will of their putative father Henry Swainson. The defendants are Mary Ann Bentley, John Bentley her husband, and Charles Swainson. The defendant Mary Ann Bentley purchased one hundred acres of the lands that were of the plaintiffs' putative father from John Swainson. The defendant Charles Swainson and John Swainson are illegitimate sons of the late Henry Swainson. These children were all children of one Margaret Walker. The late Henry Swainson, by his will, devised to each of his sons Charles and John one hundred acres of land, and he made bequests to the plaintiffs that will appear hereafter. The first clause of the will is as follows:

"I give and bequeath unto John Swainson, my illegitimate son by Margaret Walker, one hundred acres of land, being the west half of lot number one in the fifth concession in the township of Reach in the county of Ontario, subject to the legacies hereinafter mentioned, which are hereby made and declared a charge on the said lands."

The second clause of the will is as follows:

"I give and bequeath unto Charles Swainson, my illegitimate son by the Margaret Walker, the south-west quarter of lot number one in the fifth concession of the township of Reach, and lot number eighteen in the eighth concession of the township of Uxbridge, subject to the legacies hereinbefore mentioned, which are hereby charged with the payment thereof."

The fourth clause of the will is as follows :

"I give and devise unto Sarah Swainson, Jane Swainson, Matilda Swainson, Martha Swainson, and Eliza Swainson, all illegitimate children of me the said testator by the said Margaret Walker, the sum of thirty dollars each, to be paid to them on their marriage respectively or on their obtaining the age of eighteen years, and also their support and maintenance so long as they or either of them remain at home with the said John Swainson and Charles Swainson ; and I hereby charge the said lands hereinbefore bequeathed to the said John Swainson with the payment of one half the legacies hereinbefore mentioned, and I also charge the lands bequeathed to the said Charles Swainson with the payment of the other half of the said legacies."

By the fifth clause of the will he gave his personal property, after payment of his funeral and testamentary expenses, to John Swainson and Charles Swainson in equal shares. The testator died October 3rd, 1871. At the time of the purchase by the defendant Mary Ann Bentley she had notice of the charge upon the land she was purchasing, and she retained in her hands the sum of \$460 of the purchase money as an indemnity against it.

This suit is brought to compel payment of the plaintiffs' legacies, they asking that an account of the value of their annual maintenance and of the legacies may be taken, that the defendants may be ordered to pay the same, and that in default thereof the lands or a competent part thereof may be sold and the proceeds applied in and towards payment &c., and that the defendants other than John Bentley be ordered to pay any deficiency.

The cause came on by way of motion for judgment, and it was referred to the Master to enquire and ascertain whether a proper and sufficient support and maintenance had been afforded by the defendants to the plaintiffs directed by the bill, and it was ordered that in the event of the Master finding that there had not been such proper and sufficient support and maintenance of the plaintiffs by the defendants, he should ascertain and state what was due from the defendants to the plaintiffs by reason of such insufficient maintenance, and what would be a proper sum to be allowed for the future maintenance and support of the plaintiffs according to the will. Further directions and the question of costs were reserved.

The Master, by his report, found that there was nothing due by the defendants or either of them for the past support and maintenance of the plaintiffs: that Matilda Swainson had been paid her legacy on April 18th, 1881, after the filing of the bill, she having attained the age of eighteen years on October 19th, 1880: that Eliza Swainson would be entitled to receive the legacy to her of \$30 on August 13th, 1885, and that Martha Swainson was entitled to receive her legacy of \$30 on August 21st 1882, or on their respective marriages, should such sooner take place: that the sum of \$60 per annum for each of the plaintiffs, except Matilda, would be a proper sum to be allowed for their future maintenance and support according to the will: that Eliza Swainson was the only one of the plaintiffs living on the lands, and that she was living with her mother on that portion of the lands belonging to the defendants, the Bentleys, in a house provided for them: that Matilda lived with her mother and John Swainson for three years after her father's death, but has since that time supported and maintained herself: that Martha was adopted by one Blight shortly after her father's death, and was supported and maintained by him for about six years, that she then went out to service, and has since remained in service supporting and maintaining herself.

The appeal is upon the ground that the Master should have found that a proper and sufficient support and maintenance had not been afforded by the defendants to the plaintiffs as directed by the will: that the Master should have found that certain sums of money were due by the defendants to the plaintiffs by reason of such insufficient maintenance: that the Master should have found that a proper and sufficient maintenance had not been afforded by the one or the other of the defendants to certain of the plaintiffs, and that certain sums of money were due from one or the other of the defendants to certain of the plaintiffs by reason of such insufficient support and maintenance.

The appeal came on before me on the 14th instant, and I thought it desirable that the Master should certify as to

the reason of his finding that there was nothing due, whether it was because proper support and maintenance had been provided, or because the right to it had been forfeited by violation of the provisions of the will, and as to the reason of his finding at all in respect of the future support and maintenance, he having found that nothing was due, and I directed the appellant to obtain such certificate from the Master. The cause stood over till to-day, and it was agreed that the appeal should be disposed of, and the cause heard on further directions at the same time to save expense. The certificate of the Master is now produced, in which he in effect says that the reason for his finding that nothing was due was because it appeared to him that such of the plaintiffs as continued to live on the land had been supported and maintained out of the rents and profits of the lands assisted by the labours and earnings of John and Charles Swainson, and that the defendants the Bentleys had sufficiently supported and maintained such of the plaintiffs as were living on the land since purchased by them; and that he was of the opinion, and so ruled, that such of the plaintiffs as had ceased to live on the land were not entitled to support and maintenance during the period of their absence from the lands, and that it was on the request of the plaintiffs that he found as to the future maintenance and support.

It is now contended on behalf of the plaintiffs that the Master made two mistakes: first, in deciding that the fact of the plaintiffs leaving the lands deprived those who so left, of the right to support and maintenance during the period of their absence from the lands: and, secondly, in assuming that the support and maintenance should be out of the rents and profits of the lands only, the plaintiffs contending that if they or any of them, for sufficient cause, ceased to reside upon the land, this would not operate as a forfeiture or deprive them of their right to the support and maintenance, and that those of the plaintiffs who ceased to live on the land did so for sufficient cause and of necessity, and that the support and maintenance was, by the will, made a charge upon the land.


I am of opinion that the Master was in error in these two respects. I think the support and maintenance of the plaintiffs was by the will made a charge upon the lands, and I also think that the plaintiffs might, for sufficient reasons, cease to live upon the lands, and still be entitled to such support and maintenance; and I think the evidence shows that those of the plaintiffs who did cease to reside upon the land did so for sufficient reason, and that the one of the plaintiffs who still resides upon the land has not received that support and maintenance intended by the will; and I am of the opinion that there is a subsisting charge upon the lands for the value of such support and maintenance of the plaintiffs.

The question then arises, what, upon the evidence, is the proper sum to be allowed instead of the support and maintenance of the plaintiff under all the circumstances disclosed? At the close of the argument, counsel for the plaintiffs, without admitting that the evidence did not show that a larger sum should be allowed, stated that he would be satisfied with \$12.50 a year for the period of six years for each of the plaintiffs, against each parcel of the land, making the sum of \$225 against each half of the land, for support and maintenance in the past, and with \$50 a year to each of the plaintiffs as maintenance in the future, until they respectively attain twenty-one years of age. I think these sums are reasonable. I am certain that they are not greater than I should have found upon the evidence, and I think that under all the circumstances they should be adopted; and there will be judgment declaring that the portion of the lands belonging to the defendant Charles Swainson are charged with the sum of \$225 in favor of the plaintiffs, instead of past support and maintenance, and with the sum of \$75 per annum in favor of the plaintiffs instead of future support, until they obtain the age of 21 years respectively; and that the parcel of the land belonging to the defendant Mary Ann Bentley is charged in favor of the plaintiffs with the like sums, instead of such past and future maintenance respec-

tively. That portion of the sums of \$30 to each of the plaintiffs which has not been paid, is also charged in equal moieties upon the lands.

There will be an order that the defendants Charles Swainson and Mary Ann Bentley do each pay into Court the sum of \$225 within the period of one month, and that the same be paid out to the plaintiffs as may seem proper from time to time; and in default of such payment that the lands or a competent part of them be sold to satisfy the respective charges aforesaid, and that on default in payment of such future maintenance, a competent part of the land be sold to satisfy the same.

The judgment is with costs of suit, and of the appeal.

A. H. F. 

[QUEEN'S BENCH DIVISION.]

RICE ET AL. V. GUNN ET AL.

*Principal and agent—Gambling contract—"Options"—"Differences"—
Onus of proof—Proof of foreign law.*

Defendants, Toronto merchants, engaged plaintiffs, Chicago brokers, to buy and sell grain in Chicago on margin, which the latter did, advancing them money, for which they sued. Defendants having refused to settle for losses sustained,

Held, reversing the judgment of Patterson, J. A., that, assuming the State law to be that if the contract was to deal in such a way that only the differences in prices should be settled according to the rise and fall of the market, and no grain be either delivered or accepted, the contract would be a gambling contract and illegal, it lay upon defendants to establish clearly that such was the character of the dealing and this defence not having been clearly proved, judgment was given for the plaintiffs.

After judgment, at the trial, but before the argument in *banc*, the defendants put in the report of the case bearing upon the question, decided in the Supreme Court of the U. S., verified by affidavit: **Held**, admissible.

Where the opinions of experts on foreign law are conflicting, the Court will examine for itself the decisions and text books of the foreign country, in order to arrive at a satisfactory conclusion.

THIS case was tried at Toronto before Patterson, J. A., without a jury.

The learned Judge reserved the case, and subsequently delivered the following judgment, which sets out the facts:

In this case the plaintiffs, who are brokers on the corn exchange at Chicago, bring their action to recover the balance of account for transactions conducted by them, on behalf of the defendants, Gunn & Co., and James Walsh, and James Johnston. One of the questions was, whether the defendants Gunn & Co. were interested in the whole of the transactions which were conducted in the names of the other parties—different in each case—or whether these accounts were separate. I have no doubt that the accounts were separate; that although Gunn & Co. had made themselves responsible, as guarantors for Walsh, in the first place, and afterwards for Johnston when the account was transferred into Johnston's name, still the dealings were quite separate, and Gunn & Co. are answerable merely in respect of the dealings conducted in their own names; and that

Walsh and Johnston—Walsh certainly—have to answer, without Gunn & Co., for the other part of the account. The plaintiffs claim against Gunn & Co. a balance of \$825, and the amount of that is disputed by Gunn & Co., who point out in the particulars which they have furnished objections to certain items of account, or claims for certain sums which they say ought to be set off against the account. I first dispose of these questions of the items.

[The learned Judge here reviewed the evidence upon these disputed claims and disposed of them. It is considered unnecessary to repeat this part of the judgment.]

But there is a question, which covers the whole of the accounts, as to the right to sue or to recover for transactions of this kind under the law of the state of Illinois, where the transactions were being conducted, and it is that law which of course has to govern them here, as the whole of the transactions were conducted there. It was argued upon that point, with much confidence, but I am sure without any ground, that the transactions should be considered as contracts made here. The ground upon which that was argued was, that Mr. Carpenter, who was the travelling agent for Rice & Palmer, soliciting business, making arrangements for business, had come here and had in the office of the defendants made arrangements with them; had at all events invited their business, and received a promise that the defendants would give some of their business to the plaintiffs; and that he had fully apprised them of the way this business was done. But the business was done in Chicago, and the money which is the subject of the claim, money paid to the use of these parties, was all paid there. I have no doubt the contract upon which the action is brought was entirely one in the city of Chicago and governed by the law of the State of Illinois; and the question is, what the law upon the subject is to be held to be. Several legal gentlemen have been called, and have given their evidence—four of them, I think, on commission executed in Chicago—and taking their evidence all together, I do not think there is any substantial difference in the way the law is put by one or the other. If there were any difference, then it would be necessary to decide, as a question of fact, upon such materials as are available for giving decision, what the law of the State is. I may state in as short a way as I can, what I gather on the subject from the evidence which we have. There is a statute in force, which has

been in force from the 1st of July, 1874, Revised Statutes of Illinois, ch. 38, sec. 130. Looking at the wording of that statute merely, there is, as it seems to me, obviously a great deal of difficulty in holding that contracts such as these contracts, which are the subject of this dispute, are within the direct terms which are there used.

The form of all these contracts is, that of a contract made in *presenti* for the delivery of grain at a future time; for instance, in April or May contracts will be made for delivery of grain in September, October, or November; and upon the form of the contract it is one which can be enforced, and one which I have no doubt would be capable of being enforced, and so has all the elements in it of a completed contract and a real contract. There is nothing, either in the law of the State of Illinois, as shewn to us, or in our own law, or the English law, to make a contract of that sort illegal, a contract to sell and deliver grain or any other commodity at a future date, even though not in existence at the time, or in the possession of the party who sold it. It is one which can be made, and can be enforced; so that the course of dealing which, as a matter of form, at all events, is the course which these transactions take, is not one which upon the face of it is necessarily in any way illegal. It is nothing which is forbidden by the terms of the section I have just mentioned of the criminal statutes of the State of Illinois. If nothing existed but the contract in that particular shape, made as these contracts are shewn to have been made, it would be impossible to say there is anything illegal under their law. But the legal gentlemen who have given their evidence shew that, outside of the law as expressly settled by statute, there are principles on which contracts such as these alleged on the part of the defendants are held in the State of Illinois to be illegal and incapable of being enforced; and I gather from the evidence and opinions which have been given by these gentlemen, and by the decisions in the Supreme Court of the State of Illinois, to which they refer as the foundation on which they base their opinions, that while contracts of the kind are perfectly legal, they must be real contracts; and that where the dealing merely takes the form of contracts which may be legal in themselves, if real and genuine, but the course of dealing is essentially upon the understanding that the contracts are not real, and are not to be carried out—merely vehicles for speculation and gambling—then apart altogether from

provisions of the statute, those transactions are, under the law of that State, illegal. Some of the decisions seem to bring transactions of that kind within the principles of the statute, but not within the terms of the statute, but I gather they are treated as void, irrespective of the statute.

[The learned Judge here commented upon some of the decisions mentioned in the evidence of the legal gentlemen, and continued:]

The result seems to be, that the intention of the parties in entering into the contracts is a material element; and that in enquiring whether contracts are of the prohibited character or not the intention at the inception of them has to be regarded. Probably as little favourable a statement of the law to the defendants as given by any of the witnesses is that given by Mr. Dent: "The intention of our statute bearing upon transactions in grain and other commodities is directed especially against what we would call *puts* and *calls*, which are mere options to deliver or receive, not binding both parties, the one to deliver and the other to receive, but merely to give the privilege to deliver or to call for the receiving. The opinions of the Courts have fluctuated in degree, and there has sometimes been an inclination, as suggested in one of my answers to a question, whether the transactions are real or not, to go upon the actual form of the contract; though, occasionally, the Courts have, in some cases, declined to declare against the transactions on the ground of public policy."

[*Mr. Barwick*.—There is a very important question left out just at that place—left out of the copy your Lordship has—"There is a tendency of the Courts to go behind, and see whether they are real."]

While the statute was aimed at that particular kind of options called *puts* and *calls*, still, as I remarked a few minutes ago, the law, apparently, as settled by the decisions in the Supreme Court of the State, irrespective of the statute, is that if the object of the parties merely is in dealing to settle upon differences, as it is called, and not really to carry out the ostensible character of the transaction itself, the contracts are void at common law, and inhibited by sound public morality. Now, I have come to the conclusion, upon the whole evidence in this case, that that was the character of the dealings in which these parties were concerned. There are a number of propositions which I find referred to there, in the evi-

ence given in terms by the legal experts, founded on the cases to which they have referred, which are not necessary to speak of at any length, but which go to establish one or two points of this character. The broker is in these transactions the agent of his principal. If the object of the principal, when employing the broker, is to engage merely in gambling transactions—in transactions which, though in form they are purchases or sales of corn or other commodities, but in essence are intended merely to be speculations upon the rise or fall of the market, and to result in the payment of the difference in price, and not in the carrying out of the contract itself—the transactions are gambling and prohibited transactions, even though the broker, in making the sale or the purchase, deals with a person who himself deals *bond fide*. Although the broker employed by the principal goes upon change and finds a man who really has wheat to sell, and intends to deliver when the time comes, still, if the intention between the broker and his principal is to buy for the sake of selling, and so making if he can out of the rise of the market, that is within the prohibition; that the innocence of the one party with whom the transaction may be carried on does not cure the defect in the agreement between the broker and his principals. There are propositions to that effect established satisfactorily to me as being the law of the State in some of the cases to which there has been reference. Then another proposition which is laid down as established there, and which one would take to be good law, without looking for decisions anywhere to support it, is that in all these matters the mere form in which the transaction is cloaked, cannot conclusively govern; the essence of it can always be looked at and enquired into, and the evidence by which the actual intention of the parties is to be arrived at may be evidence gathered from any of the sources from which information, in any case, can be obtained, from either direct testimony, or from the circumstances of the course of dealing which, being carried out systematically, or usually, between the parties, affords evidence of the intention in entering into it. In this case the option books of the plaintiffs have been produced, and they certainly do shew that, in the majority of cases—not in all cases, but in certainly the greater number of cases—each transaction is offset or balanced by a counter transaction, sometimes with the same party, sometimes with another; and then, as explained by Mr. Rice, the one

transaction is settled by the other—in fact, by settlement of differences—by forming what is called a ring, or settling upon some such principle as the clearing house system; so that the object of the parties is shewn.

There are instances in which these transactions seem to have been fulfilled; there are a number of instances in the dealings before us in which grain seems to have been delivered, that is, by delivery of the warehouse receipts, which, as stated in some of the cases in the State of Illinois, is an act of delivery. There are a number of cases in which each that has happened. Looking at the different telegrams, I find that referred to; for instance, on the 28th of June, Gunn & Co. write respecting the person for whom they were acting, and who they say is likely to carry cash wheat. Again, on the 1st of July, "Carry until further instructions;" and on the 31st of July, "Please deliver 10,000 cash wheat you are carrying for us, early on Monday, on account of the August sold short at 19 1-8 to-day." There is, as to the storage question. On the 23rd of August Gunn & Co. telegraph, "If free storage day or two, hold; if not, sell." On the 7th of September Gunn & Co. write again, "Carry 10,000 eight or nine days free of storage." There is, on the 31st of August, "Deliver cash oats on September sold to-day early morning." On the 11th of October, referring again to cash stuff, "Purchase October wheat, first not likely wanted, cash stuff, no shorts out for it, won't accept." And again, from Johnston, in the same way, "Carry 250 cash pork." So that in the transactions indicated by these telegrams there are several of that character in which the contracts seem actually to have been fulfilled by the grain or pork being delivered. But taking the transactions as a whole, both from the evidence of what took place here when Mr. Carpenter first talked to the parties, and the form of dealing all through, from the transactions as actually shewn during the history of the accounts, and from the correspondence all through, I do not doubt at all, as a matter of fact, the dealing was engaged in intentionally by these defendants, and intentionally by these plaintiffs, as a means merely of speculating in the differences of the market, and not as a matter of legitimate trading, or with any intention to trade in that manner. The circumstance that some of the transactions resulted in real deliveries, is one which I also find in some of these cases spoken of as not necessarily affecting the result of the evidence as a whole as to what was

the original character and intention of the parties in entering into these arrangements. My opinion upon the case is, that that was the character of the dealing; that the intention of it was not to deal in this particular class of contracts which are called *puts* and *calls*, in which there is an option to sell or not to sell, or to buy or not to buy, but that the option, properly speaking, was merely an option as to time of delivery during a particular month, or during the year where it was for delivery within the year; and is only in that sense that these can be called optional contracts. I have very great doubt in holding that they come within the terms of that section, 130 of the statute; but as I understand the law of the State to be as settled by decisions in the Supreme Court, and as shewn by the legal experts who have given their evidence, transactions of that kind, apart from the statute, and whether they come within the statute or not, are transactions which are void, and cannot be enforced, as against the public policy of the State.

Upon the grounds I have indicated, I think the plaintiffs have no right in this Court to enforce their demand, and that on that account their action ought to be dismissed; but of course it shall be without costs, as both parties are in fault.

May 15th, 1883, *Osler*, Q. C., and *H. W. M. Murray*, moved to set aside the foregoing judgment, on the evidence, and for a new trial, on the ground that since the taking of the evidence on commission there had been important decisions of the State of Illinois on the foreign law in question, which did not sustain the judgment of the learned Judge in such foreign law. The transactions were legal both by the common law of England and Canada: *Bank of Toronto v. McDougall*, 28 C. P. 345; *Thacker v. Hardy*, 4 Q. B. D. 685. That the transactions were all real on the Board of Trade is admitted. The Court can examine the authorities if evidence of experts is conflicting: *Rodgers on Experts*, pp. 138-9; *Clarke v. Foss*, 7 Bissel 540; *Logan v. Musick*, 81 Ill. 415; *Sanborn v. Benedict*, 78 Ill. 309; *Pixley v. Boynton*, 79 Ill. 351.

Falconbridge, contra. The Court cannot go beyond the evidence of the experts and look at any authorities at all:

Rodgers on Expert Testimony, p. 139, sec. 102, p. 127, sec. 93; *Meagher v. Aetna Ins. Co.*, 20 *Grant* 370. It was clearly in the mind of both parties that there was never to be any actual delivery of grain.

W. Barwick, on same side. The appearance of the transactions in inception is legal, but when they are analysed they are proved, from what transpires, to be merely cloaks for gambling, and defendants might have sued and recovered the whole amount. See *Beveridge v. Hewitt*, 8 *Bradwell*, 467. By plaintiffs' ledger it appears there were no real transactions; that every purchase was sold back to the same man, and every sale bought back from the same man; and this appears from cross numbers in the ledger. This course of dealing was unfair, because as soon as the brokers were notified that the sale was closed they could carry grain for themselves: *Lyon v. Culbertson*, 83 Ill. 3

February 16, 1881. HAGARTY, C. J.—I have carefully perused the judgment of Patterson, J. A., more than once. I agree in his view as to all the disputed matters of account and adopt his reasons therefor.

If the law permit plaintiffs to recover, it will be for the amount allowed by him, \$825.

We have therefore only to deal with the important legal question as to the right to enforce this claim in our Courts.

The plaintiffs are brokers and commission merchants in Chicago. Defendants are merchants in Toronto; and it is contended that the dealings of plaintiffs at Chicago, on behalf of these defendants, were contrary to the laws of Illinois, and no claim can be enforced here.

Mr. Justice Patterson fully describes the nature of most, if not all, the dealings, which were in what is called "options." This is explained to be a bargain by which A. contracts to sell and deliver to B. a named quantity of produce at a named price, within a named time, *e. g.*, A. agrees to sell and deliver, and B. to accept, 5000 bushels of wheat any time during the month of September. The "option" is as to any time the vendor may choose within the month. Such a bargain, by our law, seems perfectly legal.

By the law of Illinois, as expounded to us by experts, ~~stated~~ as above, it seems to be legal also.

But it is contended that when the parties to the contract, ~~as~~ as part of their bargain and understanding, agree that no wheat shall be either delivered or accepted, but that a payment of money is to be made, based on the difference between the contract price and the market price, when the contract is broken, that the transaction becomes a gambling or wagering contract, and is invalid, and cannot be enforced.

The defendants contend that they entered into these dealings with the plaintiffs, as their brokers and agents, to deal in the Chicago market not in the legitimate purchase and sale of goods, but solely into a speculation in what are called "differences."

The plaintiffs insist that no such bargain was made: that it is quite true that in the vast amount of business in the buying and selling of produce, almost wholly in the hands and control of certain brokers or dealers, settlements are, in the great majority of cases, made by setting off between themselves the differences against or in favour of the respective dealers or their brokers.

It seems very clearly established that in all these dealings the parties, if they choose, may insist on and enforce, actual delivery and acceptance.

I presume we cannot state the law more fairly for the defendants than to take the evidence of their witness, Mr. Dent, a practising lawyer of twenty-eight years' experience.

He is asked if the agreement between the principal and commission merchant is, that none of the actual grain, &c., shall ever be received by the principal or delivered by him, but that every purchase shall be a set-off by a corresponding sale, and that every sale shall be offset by a corresponding purchase, and the trades closed by the payment of consequent differences, and that the dealings shall be in and for differences only.

He answers, after discussing and explaining the action

of the Illinois Courts: "Upon the naked proposition presented by the question, it would seem that the Court of highest authority in our State has not sustained a contract which has for its object merely the chances of differences on dealings in grain or other commodities."

He says that, taking each transaction between buyer and seller, a settlement by payment of the difference on cross dealings between them would not be illegitimate.

He adds, as he says, "In justice to myself, I should say that where the commission merchant is placed in the breach, and, as seems to be supposed by the questions upon cross-examination, has been induced to make contracts which are recognized by him as binding upon himself, and he has paid money for his principal, and perhaps has paid to the principal profits, I am not able to say that the law of this State would permit the principal to take the profit and avoid the transaction, so far as the transactions are unprofitable to him, retaining the profits, and standing by the transactions so far as profitable, and repudiating them only so far as unprofitable."

Mr. Ewing, an expert called by plaintiff, declares that, according to *Tenny v. Foote*, 4 Bradwell, 594, it is declared to be the law, that "no matter what form a transaction bears as to the terms of the contract, still, if the form be colourable only, and the real intention is, that there is to be no sale of the article, no delivery or acceptance, but that the transaction is to be adjusted only upon differences, it is a gambling transaction within the meaning of the statute." He says: "That, I understand, to be the law."

He is asked: "Must not the intent be mutual, or may not the intent of one party to carry out the contract in good faith make it binding, although the other party might not intend to do other than pay the difference?"

He says: "I think the intention of either party to carry out the contract, by delivering or receiving the grain, would make the contract valid."

Mr. Leonard, another expert for plaintiff, agrees in substance with Mr. Ewing, except in one or two points.

He says he does not think there is any law to prevent parties from settling the difference, provided they are unable or find it inconvenient to carry out their contract by actual delivery and receipt of the grain, and that the Courts have repeatedly held that such differences can be collected.

He thinks the statute only applies to what are called "puts" and "calls."

He agrees that if buyer and seller agree in contracting that there never shall be a delivery, but the differences only be adjusted, it is illegal.

He says: "If it were possible to hire a commission merchant to deal in differences, neither principal nor agent could recover from the other."

Munro, an expert, says: "I think it correct to say, that if the broker and his principal both intended to make gambling contracts, there could be no recovery by the broker as against his principal, whatever might have been the intention of the other party with whom the broker made the contract on the board of trade."

In a case in the Privy Council, *Bremer v. Freeman*, 10 Moo. P. C. 306, the head note is, that where the evidence of experts as to foreign law is unsatisfactory and conflicting the appellate Court will examine for itself the decisions of the foreign Courts and the text-writers, to arrive at a satisfactory conclusion on the question of the foreign law. And Lord Wensleydale's judgment very fully analyses the reports and text-writers' views.

I do not propose to go through the cases. I note, however, what appears to me to be a very clearly expressed judgment of the United States Circuit Court, in *Clarke v. Foss*, 7 Bissel, 540, laying down very distinctly the necessity of proving that it was agreed by both parties to deal only in differences, and not in actual delivery, and most of the cases are reviewed and commented on, and the defendant swore that he understood the dealings were to be wholly on differences, not on actual deliveries. The plaintiffs wholly denied any such understanding. "The real question is, what was the contract, and that implies an

enquiry as to the mutual understanding and meeting of the minds of the parties. It is easy for a party to swear what his own understanding and intentions were, but when he comes to swear to the intentions and understanding of the other party the consideration due to his testimony stands on an entirely different footing."

The whole judgment and the remarks as to these speculative operations seem to me to be marked by strong masculine common sense, and are very worthy of consideration.

The authority of this case is much strengthened by the decision in the United States Supreme Court at Washington last April, in *Rountree v. Smith*, reported in 15 The Reporter, p. 609 (a Boston publication). The decision was since this trial, and is sent in to us for the plaintiffs, verified by affidavit.

Its reception was objected to by defendants. We can receive it as any other evidence we choose to call for.

Our decision, however, does not turn upon it. The evidence there wholly failed to shew any agreement as to settling wholly by differences. The Court says: "There is no direct evidence that any of them (that is, the parties with whom the brokers dealt) either bought or sold with any other purpose than to perform the agreement as its terms bound them. The plaintiffs (the brokers) say in no instance had they any agreement with the parties to the contracts made by them for defendants (these principals), that performance was not expected or intended, but a mere adjustment of differences. And they say that actual delivery of the article was made in some of them; so that as to these contracts in regard to which the services were rendered, and money advanced by plaintiffs for defendants, there is no evidence whatever that they were not *bond fide* contracts, enforceable between the parties, and made to be performed. * * *

It is also to be observed that the plaintiffs in this case are not suing on these contracts, but for services performed and money advanced for defendant at his request; and though it is possible they might, under some circumstances,

be so connected with the immorality of the contract as to be affected by it, if proved, they are certainly not in the same position as a party sued for the enforcement of the original agreement."

I think that the evidence of the defendants from which, against the express denial of the plaintiffs, we are asked to infer the existence of an illegal bargain, is wholly unsatisfactory, and comes within the kind of evidence denounced by the Court, in *Clarke v. Foss*.

Defendant Gunn fails to prove that in the propositions made to his firm by Carpenter there was any agreement that there should be no deliveries. On cross-examination he has to admit that he cannot say deliveries were spoken of, or that there was to be no grain delivered.

McLaughlin's evidence on this point is as vague and weak. Walsh gives no evidence in point on this. Johnston says he cannot say that anything was said as to delivery or non-delivery.

It appears that in many of the transactions entered into by plaintiffs for defendants the property was delivered and received, so far as by endorsement over of the warehouse receipts, insurance by endorsers, and storage charged on the grain, &c. This, in contemplation of law, would place the grain in the possession of the buyers, and be a complete delivery and acceptance by the vendees; and as to sales the same processes took place in many cases.

I have no doubt whatever but that the defendants went into these dealings with purely speculative views, trusting to make money by the fluctuations of the market. Viewed in that light it may be called a gambling transaction, and so may a hundred other practices in the commercial world, which in one sense are as much matters of chance as the casting of dice, or the shuffling of cards.

But where a defence of this nature is set up by parties who willingly took all the profit they could make in the transaction, but endeavour to avoid the loss because the dice have turned up unfavourably, we must be careful to see that the only defence open to them must be proved with reasonable clearness.

We cannot state more favourably to them than to hold that if the contract was a dealing in options, to be settled wholly by adjustment of differences, without either receipt or acceptance of the goods, that the contract was by the foreign law invalid, and cannot be enforced here.

I am strongly of opinion that the defendants have failed to prove this defence, and that the plaintiffs are entitled to our judgment for \$825.

As I think the defendants fail in the necessary proof, I do not propose to discuss whether the view of foreign law above stated may not be open to serious objection. The defendants cannot complain if we accept it for the purposes of this suit as they present it to us.

Lewis on the Law of Stocks, &c., published 1881, (Phil.) chapter 6, on wagering contracts, is a very good summary of the United States laws. The English law is also fully noticed. Most of the Illinois cases are cited. At page 106 the question is discussed whether the broker can recover from the principal his commission and advances made to and in fulfilling a wagering contract. In this has to be borne in mind the distinction between a void and illegal contract.

On this the remarks of the Supreme Court, in *Rountree v. Smith*, already cited, may be referred to.

ARMOUR and CAMERON, JJ., concurred.

Judgment for plaintiffs for \$825.

[CHANCERY DIVISION.]

JENKINS ET AL. V. THE CENTRAL ONTARIO RAILWAY
COMPANY.

General Railway Act—Compulsory purchase—Mines—Injunction—County Judge's order for immediate possession—R. S. O. ch. 165, sec. 20, sub-sec. 23.

Where the special Act of a railway company incorporated the clauses of the General Railway Act relating to powers, plans, and surveys, and lands and their valuation, and also authorized the company from and out of the ores obtained along their line of railway, to manufacture iron and steel for their own use, and to acquire mining properties by purchase; and the company had chosen a site for a station upon the lands of the plaintiffs, covering a valuable mine of magnetic iron ore, and called upon the plaintiffs to arbitrate, and the plaintiffs were unwilling to part with the land.

Held, that the plaintiffs could not obtain an injunction restraining the company from expropriating the land in question, even though it were conceded that the company knew of the mine, and that it was the property of the plaintiffs, for the Legislature had left the expropriation clauses to their full effect, which, in this country, at least, enables the company to acquire the fee of the land.

Aliter, if it were proved that the company were acquiring the land not for the purposes for which the powers were given, but for some collateral object, as, for example, with the object of afterwards selling it to a third party.

Seemle that, if it should afterwards appear that such a scheme was actually in contemplation, and had been carried out, means might be found to frustrate it.

Seemle, also, that the powers conferred on the County Judge under the Railway Act of Ontario, R. S. O. ch. 165, sec. 20, sub-sec. 23, of ordering immediate possession, before arbitration had, do not exclude the jurisdiction of this Court to enjoin the taking of possession, if the company is making use of their powers to attain any object collateral to that for which it was incorporated; but otherwise it is not within the jurisdiction of a Judge of this Court to interfere with an order of the County Judge, though granted *ex parte*.

THIS was a motion for an interlocutory injunction in the above action, which was one brought by William Jenkins and James Chambers against the Central Ontario Railway, seeking an injunction under the circumstances set out in the judgment.

The motion was made on May 15th, 1883, before Proudfoot, J.

C. Moss, Q.C., for the plaintiffs. It is doubtful whether, under 45 Vic. ch. 61 (O.) the railway company has power to expropriate even ordinary lands for the purpose of this extension. Section 13 of that Act limits the right of the railway to acquiring mines by purchase or gift, not by compulsory powers. Then, under section 14 they have no

power to expropriate, for that section refers to clauses of the Ontario Railway Act, R. S. O. ch. 165, as incorporated in 36 Vic. ch. 73, which does not incorporate them at all. Under the circumstances this Court has jurisdiction to control the action of the company. The evidence shews they are endeavouring to exercise a power which 45 Vic. ch. 61 (O.) says they shall not have. There is no doubt the defendants knew of the existence of this valuable mine. The Court may control the powers of a railway when exercised for a colourable purpose: *Galloway v. The Mayor and Commonalty of London*, L. R. 1 H. L. 34; *Eversfield v. Mid-Sussex R. W. Co.*, 3 DeG. & J. 286; S. C. 1 Giff 156; *Dodd v. Salisbury R. W. Co.*, 5 Jur. N. S. 783. We are neither bound to sell our mine, nor to go to the expense of making experiments to ascertain its value.

Clute, on the same side. Under R. S. O. ch. 165, sec. 20, subsec. 1, (c) (1) the company must shew that the land is required for their railway. This is the basis of the right to expropriate. At any rate there is jurisdiction to interfere here, on the ground of a fraudulent use of their powers by the defendants. The course they took to get possession, by making an *ex parte* application to the County Judge, was a wrongful one, and should be restrained.

J. Bethune, Q.C. As regards sec. 14 of 45 Vic. ch. 61, it must be remembered that the Railway Act of Ontario, R. S. O. ch. 165, is a revision and not a new law. It is taken from Consol. Stat. Can. ch. 66 and amending Acts. Besides, 45 Vic. ch. 61 is practically a new Act, and many come within R. S. O. ch. 165, sec. 4. The provisions of these English Acts differ from those of our Acts. In England a deed in fee only gives the right of way. It is not so with us. See *Anglin v. Nickle et al.*, 30 C. P. 72. There is no exception in our Acts in regard to the power of expropriation. Compensation takes the place of the land: R. S. O. ch. 165, sec. 20, subsec. 24. But as to the English provisions, see English Act of 1845, Imp. 8-9 Vic. ch. 18, (Land Clauses Consolidation Act). Then R. S. O. ch. 165, sec. 20,

sub-sec. 23, provides a special tribunal for such cases, and empowers the County Judge to allow possession on security being given, and there is no appeal to this Court from his decision. Section 9 of the same statute gives an unlimited power to take lands. See also sections 10, 19. Arbitration is the only remedy for the land owners: *London and North Western R. W. Co. v. Bradley*, 3 McN. & G. 326; *Caledonian R. W. Co. v. Ogilvy*, 2 Macq. 246. The endeavour to take this case out of these authorities, on the ground of collateral intention, ought not to succeed. The company has the legal right to do what they are doing. I refer to *Duncan v. Findlater*, 6 Cl. & F. 894. The cases cited on this point by the plaintiffs were cases where there was no intention of carrying out the object of the statute. *Galloway v. The Mayor and Commonalty of London*, L. R. 1 H. L. 34, was a case of that kind. If the company is acting within its legal right there is no equity to restrain them. Any inconveniences arising have to be provided for by the Legislature: *Hardcastle on Statute Law*, pp. 23, 25, 26. But here the plaintiff is not injured, for he gets the full value; and there is a right of appeal from the arbitrator's award to the High Court of Justice: R. S. O. ch. 165, sec. 20, subsecs. 19, 20. The company are sole judges of the danger of working mines: *Mills on Eminent Domain*, sec. 62; *Midland R. W. Co. v. Checkley*, L. R. 4 Eq. 19; *Midland R. v. Co. Checkley*, 15 W. R. 671; *Cotton v. Boom Co.*, 22 Minn. 372; *Stark v. Sioux City and Pacific R. W. Co.*, 43 Iowa 501. Moreover, the balance of convenience, as well as the policy of the law, is in favour of not continuing the injunction; nor would it have been granted in the first instance if attention had been called to R. S. O. ch. 165, sec. 20, subsec. 23. I refer also to *Redfield on Railways*, vol. 7, p. 336; *Brice on Ultra Vires*, 2nd ed., p. 514-15; *Directors of the Stockton and Darlington R. W. Co. v. Brown*, 9 H. L. C. 246; *Attorney-General v. Great Eastern R. W. Co.*, L. R. 7 Ch. 475; *S. C. in Appeal*, 6 H. L. 367. *C. Moss*, Q.C., in reply. What we claim is, that the defendants are using their powers for a colorable purpose,

and not acting *bond fide*. R. S. O. ch. 165, sec. 20, sub-~~Sec.~~ 23, only applies where a company is exercising its ~~legal~~ power in good faith, not where it is endeavouring to ~~use~~ the tribunal there provided for an improper purpose. ~~Then~~ the clauses as to arbitration only apply when the ~~company~~ has the right to take the land in question. The ~~company~~ are not the only judges of what they need: *Eversfield v. Mid-Sussex R. W. Co.*, 3 DeG. & J. 286. I refer to *Lancaster and Carlisle R. W. Co. v. North Western R. W. Co.*, 2 Kay & J. 303, where persons were restrained from applying to Parliament, and to *Carington v. Wycombe R. W. Co.*, L. R. 3 Ch. 377, 381, 385; and to *Lamb v. North London R. W. Co.*, L. R. 4 Ch. 522, which shows that an extending Act, such as 45 Vic. ch. 61 O., does not carry with it the powers in the original Act.

May 22nd, 1883. PROUDFOOT, J.—The Prince Edward County Railway was incorporated in 1873 (36 Vic. c. 73 O.), with power to construct a railway from any point on the Grand Trunk Railway, between Trenton and Brighton to Picton, and to extend it eastward to South Bay or Point Traverse, in the township of South Marysburgh; and in the special act were included, among others, the clause of the Railway Act of the consolidated statutes of Canada relating to powers, plans and surveys, and lands and their valuation.

Several amending Acts were passed, the last of which (45 Vic. c. 61,) changed the name of the company to The Central Ontario Railway, and authorized them to extend their line of railway to any part of the townships of Tudor Lake, Wollaston; and Limerick, in the county of Hastings, (s. 5.) This Act also authorized the company upon their own property, and principally from and out of the ores obtained along their line of railway, to manufacture iron and steel for their own use and for sale; and for that purpose to erect furnaces and mills, and provide machinery and tools, (s. 9.) And it also gave them power to acquire mining properties, by purchase or gift, in the

nty of Hastings, (s. 13.) The company were also authorized to build the railway in sections of five miles in length, and to make surveys, and a map or plan of the way, and its course or direction, and also the book of reference for the railway, and to deposit the same as required by the Railway Act of Ontario, with respect to plans and surveys;" and upon the deposit of the map or plan and book of reference, all and every of the clauses of said Railway Act and the amendments thereof applied included in, or incorporated with the Act of Incorporation of the railway company, were to apply to each of its sections.

The company are extending their line to the township of Vollandston, and have made their survey and deposited a map or plan, as required by the Act.

Upon this map they have marked a site for a station on the lands of the plaintiffs, and have made a tender of \$300, as compensation for the land required by them, and damages, which the plaintiffs have refused; the company have given notice to the plaintiffs to arbitrate; the company have also obtained an order for immediate possession from the County Judge, before any arbitration has been had, under sec. 20, sub-sec. 23, of the Railway Act of Ontario.

The plaintiffs have brought their action to restrain the defendants from taking possession or taking any steps to appropriate this piece of ground marked out for a station on their land; because it is not necessary for the purposes of the railway; and because the company are making an improper use of their compulsory powers in order to get possession of a very valuable mine of magnetic iron ore, the site of which is entirely covered by the proposed station grounds.

A number of affidavits have been filed on behalf of the plaintiffs, which I do not intend to examine in detail, further than to say, that I think they establish the fact, that there is a valuable deposit of magnetic iron ore at this spot: that the plaintiffs purchased the land for this

mine some two or three years ago : that the defendants or some of their officers were probably aware of the existence of the mine, and of its being the property of the plaintiffs, and for the purpose of this motion I will assume that they did know these facts.

The defendants, by their president and engineer, say, that this spot is the northern terminus of their railway, and that they will require more land than they have yet taken steps to procure : that although they own other land on an adjoining lot, they are working an extensive iron mine on it, and that it would be dangerous to place a station there on account of the use of explosives in blasting &c. : that the location was made in good faith.

The plaintiffs contended that the defendants had no power to expropriate the lands at all, on account of an erroneous expression in 45 Vic. ch. 61, sec. 14, O., which says that on the deposit of the map or plan the clauses of the said Railway Act, the Ontario Act, incorporated with the Act of Incorporation of the railway, should extend to the sections authorized to be built, while the Act of incorporation, 36 Vic. ch. 73, O., incorporated none of the clauses of the Railway Act of Ontario, but those of the Consolidated Statutes of Canada. I do not think this argument ought to prevail. It is evidently a mere clerical mistake, which if strictly construed would render the Act practically inoperative. But the continual references throughout the 14th sec., show that the Legislature thought they were conferring upon the company the powers of the Ontario Railway Act with regard to the sections, similar to those possessed by the company with regard to the original line in the 36 Vic. ch. 73, and that intention should not be frustrated by an error of this kind. Besides, if construed in the way contended for, there would be no expression conferring powers in the special Act, and the Railway Act of Ontario would apply by virtue of its 4th section : (R. S. O. ch. 165, sec. 4).

The principal question is, whether the defendants have the power to locate their line as they have done, though

one of their objects may have been the acquisition of this mine.

The last Act conferring powers on the defendants of acquiring mines by gift or purchase, and of working them &c., and which speaks of them being found upon their own property, as well as being acquired on adjoining lands, shows that the Legislature were aware that the railway was going through a mining country. But the Legislature have not seen fit to impose any limitations on the rights of the company in locating their line, where there are mines, by giving only a right of way over the surface, or otherwise, but have left the expropriation clauses to their full effect, which in this country at least, enables the company to acquire the fee of the land. The power to acquire mines by purchase, in the Act of 45 Vic., must include the power to acquire them by compulsory purchase and have the same effect as *purchase* employed in the General Railway Act, (R. S. O. ch. 165, sec. 9, sub-sec. 2,) which includes purchase compulsorily as well as by agreement. The choice of the line, the location of station, &c., is left to the company to determine, the only preliminary being the filing of the map and plan. I have not been able to find much authority on the effect of filing plans. The English practice requires these to be filed before the passing of the special Act, and persons affected by them have an opportunity of opposing the passing of the law. Here they are only required to be filed before beginning the work, and no provision is made for objecting to the line as located, or the stations. The Legislature seem to have thought that the company would take the most direct and cheapest route, and that persons affected by it could be indemnified by the compensation to be obtained under the act: *In re Stratford and Huron R. W. Co. and The Corporation of County of Perth*, 38 U. C. R. 112; *Re Grand Junction R. W. Co. v. County of Peterborough*, 6 App. 339, 366.

But while the Legislature has conferred large powers on these railway companies. they must be exercised honestly for the purposes for which they were given, as expressed by

Lord Cranworth, in *Galloway v. Mayor and Commonalty of London*, L. R. 1 H. L. 34, 43: "The principle is this, that when persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the Legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object: that is for any purposes except those for which the Legislature has invested them with extraordinary powers." This language is cited and approved in *Carington Wycombe R. W. Co.*, L. R. 3 Ch. 377, 381; and in many others before and since these the same principle has been recognized and acted on. But in none of them, so far as I have noticed, which was decided on this principle, was the company carrying out the object for which they were created by the means of these powers. The enunciation of the principle in fact excludes the application of it to such cases. The object was always something collateral.

Thus in *Eversfield v. The Mid-Sussex R. W. Co.*, 3 DeG. & J. 286, the company were endeavoring to expropriate a piece of land, not for the use of the company, but to exchange it with another land owner. In *Carington v. The Wycombe R. W. Co.*, L. R. 3 Ch. 377, the company were desirous of expropriating the land to sell to another person, not for the purposes of the railway. In *Galloway v. Mayor and Commonalty of London*, L. R. 1 H. L. 34, a distinction was drawn between powers conferred on adventurers for a specific purpose, such as the construction of a railway, and powers conferred on an existing corporation, such as that of a city, for making public improvements in the city, and in the latter case the powers will not be subject, as in the other, to a strict and restrictive construction; and Mr. Galloway in that case failed to bring the facts within the operation of the principle. The other cases cited by Mr. Moss are all, I think, distinguishable on this ground. For in the present case I fail to see in what respect the defendants have exceeded their powers, or diverted them to a purpose

to contemplated by their charter. The company were authorized to construct the railway, they were authorized to engage in mining operations, to acquire mines by gift or purchase, and upon the site of the location of their line, at all events, I think by compulsory purchase. There is no prohibition against running their line so as to cover a mine, and the statute evidently thought that mines would be found on their property.

The case would be entirely different if what was suggested in argument had been established by evidence: that the defendants were seeking to expropriate this piece of land, not with the real intention of using it for a station, and for the works of the railway, but with the design of acquiring it and then to sell it to W. Coe, who is a shareholder in the railway company, and largely interested in mining operations. Under such circumstances the principle enunciated in *Galloway v. Mayor and Commonalty of London*, (*supra*), would apply. But the evidence fails to establish any such design. Should such a scheme be actually in contemplation, and be hereafter carried out, I think it means might probably be found to frustrate it.

As at present advised, were it necessary to determine the point, I do not think that the powers conferred on the County Judge would exclude the jurisdiction of the Court, if the defendants were making use of their powers to attain any collateral object to that for which they were incorporated. In *Jones v. The Stanstead, Shefford, and Chamblay R. W. Co.*, L. R. 4 P. C. 98, 115, it is said: "The claim for damages in an action in this form, assumes that the acts in respect of which they are claimed are unlawful; whilst the claim for compensation, under the Railway Acts, supposes that the acts are rightfully done under statutory authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the tribunal to which recourse should be had." The claim for damages in that suit and the relief sought here equally proceed on the ground that the defendants' acts are unlawful. The principle stated in *Jones*

instead, *Sheppard, and Chambly R. W. Co., &c.*, was
over in the subsequent case of *The Mayor, &c., of
Montreal v. Drummond*, L. R. 1 App. Cas. 384, 413.
But as I am with the defendants on the other point it is
not necessary to consider this one further.

The defendants it seems have obtained *ex parte* from the
Judge of the County Court of the County of Hastings a
warrant to the sheriff of the county to put them in imme-
diate possession of the lands, and this the plaintiffs seek to
restrain on the ground that it was obtained in order to
prevent the plaintiffs from developing their mine and to
enable the defendants to procure the same at a nominal
sum.

I would certainly have thought that no such order should
have been made without notice to the land owner. But
the statute R. S. O. ch. 165, sec. 20, sub-sec. 23, gives the
power to the County Judge, and does not require notice
to be given. He is the only person who is to be satisfied that
the immediate possession of the land is necessary for the
prosecution of the railway, and security is to be given to
his satisfaction for payment of the compensation: and, as I
think it not proved that the company is exercising its
powers for an unauthorized object, it was also quite within
their power to apply for this order, and as the County Court
Judge in the exercise of this duty is discharging a judicial
function, I do not think it within my power to interfere
with the mode of procedure he has adopted. I am the more
satisfied of the propriety of this course, when I observe
that the objection to the Judge's order is that it prevents
the plaintiffs from developing their mine so as to ascertain
its value, and the defendants by their counsel offered every
facility to the plaintiffs by tests and otherwise so as to
ascertain that value.

A. H. F. L.



[QUEEN'S BENCH DIVISION.]

REGINA V. BERNARD.

Conviction—Prior conviction—Refusal to receive evidence of—Costs.

A warrant was issued by a magistrate for the apprehension of the defendant, who was brought before another magistrate thereon, convicted and fined. Subsequently the magistrate who had issued the warrant caused the defendant to be summoned before him for the same offence, and again convicted and fined him, after refusing to receive evidence of the prior conviction.

The Court quashed the second conviction, with costs.

Held, that, even assuming that the first conviction was void by reason of the defendant having been brought before a magistrate other than the one who issued the warrant, his appearance and pleading thereto amounted to a waiver, and at any rate the magistrate who convicted the second time could not take advantage thereof.

THIS was a motion to quash a conviction on the ground of a prior conviction.

The facts were, that a warrant dated 13th November, 1883, having been issued substantially in form "C," 32 & 33 Vic. ch. 31, save that it did not contain the clause stating that the information was on oath, the defendant appeared before a justice of the peace other than the one signing the warrant, and the evidence having been taken he was convicted and fined. The warrant directed that the defendant should be brought before the Justice (James Johnston), who signed the warrant, "or one of Her Majesty's justices of the peace in and for the county of Carleton."

The magistrate who signed the warrant, being dissatisfied with the fine inflicted, and, as it was alleged, being annoyed at not receiving any costs for issuing the warrant, caused the defendant to be summoned before himself and another justice on the 24th of November, and evidence being taken, fined him \$5 and costs, and had the amount levied by distress and sale.

Watson, for the motion.

Alan Cassels, contra.

February 26, 1884. ROSE, J.—There is evidence, which I credit, that Johnston refused on the second hearing to receive evidence of the prior conviction. As he had actual personal knowledge of the first conviction before he issued the summons, it seems to me he would not have been in a better position had no evidence been tendered. I believe the first conviction was in good faith.

Mr. Cassels urged that the first conviction was void, because section 43 of 32 & 33 Vict. ch. 20, which he urged was the only section giving jurisdiction to the magistrate to proceed summarily, did not provide for a hearing except before the magistrate receiving the complaint and issuing the warrant.

It will be observed that the defendant was not brought before the justice on the second occasion under the warrant, but appeared upon a summons issued after the second conviction. Admitting, for the sake of argument, Mr. Cassels's contention, that section 43 contemplated the hearing by the magistrate before whom complaint is made, the simple answer is, that the defendant having appeared and pleaded he could not have raised any question as to irregularity in the summons, or even the want of information or summons, and that therefore the magistrate who took upon himself to institute and carry on the proceedings ending in the second conviction, cannot raise any such question: *Paley on Convictions*, pp. 82, 88, 97. The two convictions cannot stand. The first is, in my opinion, good and the second must be quashed, and with costs to be paid by Johnston. It seems to me the attention of the Attorney-General might well be called to the facts which appear on the affidavits, and which I have not found it necessary to refer to very fully.

Conviction quashed.

[QUEEN'S BENCH DIVISION.]

RE HARDING AND WREN.

Arbitration—Costs.

When the submission or order of reference is silent as to costs, arbitrators have no power to adjudicate upon them, but each party must bear his own costs and half those of the award.
 A direction as to the costs in such a case, *Held*, severable from the rest of the award.

THIS was a motion on behalf of Harding to set aside an award on the ground that the arbitrators improperly awarded costs to Wren, the submission giving the arbitrators no power over costs.

Holman, for the motion.

Smith (St. Mary's), contra.

The arguments appear in the judgment.

March 4, 1884. ROSE, J.—Mr. Smith admitted that so far as the award directed Harding to pay solicitor's costs it could not be supported, but argued that the arbitrators had power to award that each party should bear his own expenses of his reference and one half the costs of the award. The answer is, first, if they had any such power they did not exercise it, but ordered Harding to pay "the fees and expenses of the arbitrators." Second, in my opinion, they had no such power. *Taylor v. Lady Gordon*, 9 Bing. 573, which Mr. Smith relied upon, contains the following opinion expressed by Tindal, C. J.: "The general rule in cases of reference is this, that where the order of *nisi prius* is silent upon the subject of the costs of the reference and award, the arbitrator has no authority to adjudicate upon them, but each party must bear his own expenses and the half of the award." See also *Russell on Awards*, 6th ed., pp. 381-382; *Leggo v. Young*, 16 C. B. 626; *Glen v.*

Grand Trunk R. W. Co., 2 P. R. 377; *Whitely v. McMahon*, 32 C. P. 453; *Re Egleston and Taylor*, 45 U. C. R. 479.


Mr. Holman admitted that the directions as to costs were severable from the rest of the award, and that he could not hope to have the award set aside.


I make the same order as in *Egleston v. Taylor*. To use the words of Osler, J., in that case: "The award is therefore void only *pro tanto*. The matters complained of are surplusage, and the rule must, in accordance with the authorities referred to, be discharged." There will be no costs.

Motion dismissed.

[QUEEN'S BENCH DIVISION.]

HERRING V. WILSON.

 *Distress for rent—Seizure of goods subject to chattel mortgage—Liability of tenant to protect chattel mortgage.*

 P. leased certain premises to Y., who assigned the lease to P., and sold to him the goods on the premises subject to a chattel mortgage to the plaintiff and others. P. gave a chattel mortgage to the plaintiff and others upon these goods to secure to them the purchase money thereof. On 1st February the defendant took possession of the premises under a verbal agreement with P., that the latter should assign the lease to him, and it was so assigned on 4th June following. There was no evidence as to what bargain there was between P. and the defendant as to the goods, but the goods remained on the premises without the request of the defendant. The plaintiff and his co-mortgagees subsequently took possession of the goods under their chattel mortgage; but on the same day, before they were removed, the landlord seized them for rent, a portion of which was due before defendant took possession. Upon the promise of the plaintiff to pay the rent the landlord withdrew. The plaintiff having refused to keep his promise by paying the rent, the landlord brought an action against him and compelled payment. The plaintiff now sued the defendant to recover the amount so paid.

Held, that, there being no privity of contract or estate between the defendant and the plaintiff, and the goods not having been originally placed in the premises at the tenant's request, and having in fact been in the possession of the plaintiff when seized, the defendant was not bound to protect them against seizure for rent, which he was not shewn to have been liable for: that the plaintiff's payment therefore was voluntary, so far as concerned the defendant, and he could not recover.

THIS case was tried before Burton, J.A., without a jury, at the fall sittings of the Napanee Assizes, and judgment directed to be entered for the plaintiff for \$220, with full costs of suit.

The plaintiff's claim arose under the following circumstances. Benjamin Briscoe, the owner of an hotel in Napanee, called the "Briscoe House," with the premises attached, demised the same by indenture of lease, bearing date the 25th March, 1879, to one Abel Yates, his executors, administrators and assigns, for five years from 1st of May, 1879, paying a rent of \$3 a day during the term; any assignment of the lease or term to be void unless made with

consent of the lessor in writing. On the 29th October, 1880, Yates, with the consent of the lessor in writing, assigned the residue of the term to Samuel Jesse Potter, with the exception of the opera or billiard hall, and certain other rooms. Potter, in consideration of the assignment, covenanted with Yates to pay the rent, and observe and perform the covenants, agreements, &c., to be paid, observed and performed by Yates under the lease.

Two days before the date of this assignment an agreement, bearing date 27th October, 1880, was made by and between Yates, of the first part, the plaintiff, Charles Lane, Mitchell Neville, C. R. Miller, and Walter Scott Williams, of the second part, and the said Samuel Jesse Potter, whereby—after reciting the lease and that Yates on that day had assigned and transferred all his title in the lease and premises, and to the goods in the Briscoe House and upon the premises to Potter; and that the plaintiff and other parties of the second part had a chattel mortgage upon the said goods and chattels for \$4,000, and that they had agreed to sell to Potter the goods and chattels for \$5,041.80, and Potter agreed to purchase them at that sum,—the said Yates released all his claim to the goods and chattels in the chattel mortgage given by him to the said plaintiff and the said other parties of the second part, and Potter agreed to pay the plaintiff and the other parties of the second part the said sum of \$5,041.80, as follows: \$500 cash; \$500 on 1st May, 1881; \$500 on 1st November, 1881, and the balance of \$3,541.80 on the 1st May, 1882, with interest on the whole sum from time to time unpaid at eight per cent.; also to pay taxes, rent, insurance, and a further sum of \$35 on Monday of each week until the whole sum of \$5,041.80 should be paid into the Dominion Bank at Napanee to the credit of the plaintiff on behalf of the parties of the second part, which sums of money were to be first applied towards the payment of the rent of the said premises, insurance, interest and taxes, and the balance, if any, to be applied as part payment of the said purchase money, which Potter had agreed to pay

and further, that on default of Potter paying the weekly payments on each Monday, and if any one of the weekly payments should be in arrear for four weeks, the said Potter should peaceably and quietly give up possession of the said premises and goods, and the parties of the second part might take possession of the said premises and goods, and eject and expel the said Potter therefrom without previous suit or legal proceedings; Potter to secure the payment of the said sums of money to the plaintiff and other parties of the second part by a chattel mortgage on the property in and upon the said premises; and Yates released to the parties of the second part the money in the bank.

By indenture, dated 4th June, 1881, made between the said Potter and the defendant, Potter assigned, transferred, and set over to the said defendant the said lease and the residue of the said term, the lands and premises therein mentioned, and all the benefits, rights, and advantages in and by the said lease demised, but subject to the terms and conditions in the said lease contained; in consideration whereof defendant covenanted with Patton to pay the rent in and by the lease reserved for the residue of the said term, and to do, observe, perform and keep all and each of the covenants, agreements, and stipulations in and by the said lease by the said Abel Yates, and by the assignment thereof by the said Potter, to be paid, observed, performed and kept, and to indemnify, save harmless, and keep indemnified the said Potter in respect of the said covenants, agreements, and stipulations.

By the evidence it appeared that the defendant had gone into possession of the hotel before the execution of the assignment to him about the 1st February, 1880, and it did not appear very clearly whether there was any or what agreement between him and Potter respecting the chattels. Potter, who was called as a witness for the plaintiff, on being asked what was the bargain as far as the goods in the hotel were concerned, said it was in writing, and he did not suppose there was anything else besides what was in the written agreement; and in answer

to the question, "What was the bargain you made in February?" he said, "I can not tell you what the bargain was because it is long ago. I do not want to commit myself. I may possibly say something that is different from the bargain, because I do not remember."

He also said when he made the bargain he was in possession of the chattels described in the mortgage, and delivered up possession to the defendant, who carried on the business, and before doing so made the bargain of the transfer of the chattels, and he supposed also of the lease it was all one bargain. Defendant gave him something for some things in the bar which he thought were separate from the chattel mortgage. Defendant, he supposed, as far as the goods were concerned, took his place. He transferred the whole of the goods and the lease: thought he got the consent of the landlord at that time to the transfer: did not go to him to get his consent: did not know how it was got, but it must have been got; did not know why the assignment was not executed till 4th June: defendant had not enough furniture independently of the chattel mortgage furniture to carry on the hotel.

In answer to the question: "What was the agreement between you and Wilson as to the payment of the rent under the lease?" he answered: "I suppose the lease shews for itself. After the 1st of February I was not to pay any rent. The man in possession, Wilson, was to pay. When I executed this paper (assignment of lease) on 4th June, I thought that embodied the agreement which existed between him and me on the 1st of February."

On cross-examination, he said: "I do not think there could have been any other agreement between Wilson and me than that which is in writing. I am not aware of any other. It might have been executed about the time it bears date. I do not remember the fact of the execution. I believe the hotel was carried on after the furniture was taken away * * when I left the rent was paid up to the 19th February. I do not know what payments were made after that."

On re-examination he said, in reply to the question was the note paid? "Yes, by the defendant."

The landlord's consent to the assignment of the lease to Wilson, the defendant, was dated 29th January, 1881, and Mr. A. L. Morden, the solicitor for the landlord, said he had no doubt it was signed at that date. It was not on the assignment, but on the lease itself.

On the 7th May, 1880, by a memorandum of agreement in writing and under seal, made between the landlord of the said hotel and premises, of the first part, the said Abel Yates, of the second part, and the plaintiff and the said other parties of the second part, named in the above agreement of the 27th October, 1880, of the third part—after reciting the original lease, that Yates was in arrear for rent up to the 1st May, 1880, the sum of \$1,530 and that the landlord had distrained for the said rent and his bailiff was in possession of the goods and chattels in the said hotel, and that Yates had by chattel mortgage, dated 21st May, 1879, conveyed and assigned the said goods and chattels to the said Herring and the said other parties of the third part, to secure the payment of two promissory notes for \$2,000 each with interest at eight per cent., and that the said notes were overdue, and that it had been agreed that the landlord should, in consideration of \$1,100 paid by the said parties of the third part, release the said furniture and property from all liability for any rent accrued before the 2nd May, 1880, and should agree to lease the said premises for the residue of the said term, or assign the lease, and that Yates should in the meantime, and until forfeiture, remain in possession of the said premises as tenant, and that upon forfeiture as therein after mentioned the residue of the said term should either pass by sale or assignment, as after mentioned—it was witnessed that the said landlord released and discharged the goods and chattels from the said rent accrued due up to the said 2nd May, 1880; and he covenanted to and with the said parties of the third part, that in the event of the said Abel Yates failing to observe, keep and perform the

covenants, &c., after mentioned, the said landlord would assign the said lease as far as he had power to do to the plaintiff, or to any other person whom he should approve as a tenant, or would make a lease to plaintiff for the residue of the term; or would make such lease to such person as the landlord should approve of. And the said Yates covenanted to and with the said Herring and other parties of the third part, that he would on each and every Monday from the 1st May, 1880, to the first June, 1880, pay - cause to be paid into the Dominion Bank to the credit of the said John Herring the sum of \$25 weekly; and from the 1st of June to 15th July, the sum of \$30 weekly; and from the 15th July to the 15th August, the sum of \$25 weekly; and from the 15th August until the 1st of May, 1881, the sum of \$35 weekly; and if at any time during that time a purchaser could be found for all the said furniture on the said premises, and residue of the said term and the goods and chattels mentioned in the chattel mortgage, and articles and plant used in connection with said premises, at and for the price and sum of \$6,000, or any sum in excess of said sum, then the said Yates would assign the said lease goods and furniture to such purchaser at the request of the said plaintiff and parties of the third part, or any person on their behalf; and further, that on default of his making the said weekly payments and any weekly payment should be in default for four weeks in succession, or if any two of the said weekly payments should be in arrear for one week, then Yates should peaceably and quietly give up possession of the said premises, furniture, goods, and chattels mentioned in the said chattel mortgage; and the said plaintiff and other parties of the third part might take possession of the said premises and goods and chattels, and eject and expel the said Abel Yates therefrom without previous suit or legal proceedings. Provided if a sale for the said sum of \$6,000, or any sum in excess of that sum, within six months were made, the said Yates should receive and have the difference between that sum and \$4,920.10, with interest from

when he got to the hotel on the 13th, he found a large number of men removing all the furniture and goods out to the street, not a fourth part of the goods having then been removed. Plaintiff was there. He and his associates said "Don't seize our goods, Wilson ought to pay the rent." Wilson said: "Don't seize my goods, I have more than paid the rent. Seize their goods." Potter was not there. The solicitor further said: "I took some pains to ascertain the truth of these contentions. They were so hopelessly diverse that I could make nothing out of it, and told the bailiff to go on and seize the goods. The mortgagees said we must remove our goods under any circumstances, and they made an agreement with me. * * Mr. Herring was the spokesman. He said: 'If you will let us remove the goods, we will pay the rent.' Upon that understanding I let them remove the goods, and directed the bailiff to withdraw the seizure, and he did so, and they went on removing the goods. Afterwards Herring refused to pay, and an action was brought in the Court of Chancery, and the plaintiff (the landlord) recovered."

On cross-examination he said: "Herring denied making an agreement with me at the trial. He swore to that. He contradicted me on the point. Of my own knowledge I did not know what rent was due—no more than I gathered from the documents and the statement of the landlord at the time. Defendant had nothing to do with the withdrawal. He contended we ought to seize the mortgagee's things, because he said they ought to pay the rent. It was altogether on the arrangement entered into between me and Herring that I withdrew the seizure. I think they removed all the property. I do not know whether they removed any of Wilson's. I knew he complained that his property had been taken. I think Wilson remained for a few days, but on that same day there was an agreement between the landlord and Wilson and Chichester to grant a new lease. The lease was surrendered on that day."

Alexander Ross, a clerk in the office of Mr. Hooper

Herring's solicitor in the suit of *Biscoe v. Herring*, proved the payment of \$628.99 to Biscoe's solicitor, which he said he received from the defendants in the suit—\$220.99 taxed costs and \$538 the judgment. On cross-examination he said there were five or six who contributed the amount, Herring only paid one-fifth of it.

The learned Judge directed judgment to be entered for \$222.

November 28th, 1883. *Clute*, for the defendant, moved pursuant to notice to set aside the said judgment, and to enter a nonsuit or judgment for defendant, on the grounds—1st, that the said judgment was contrary to law and evidence, and the weight of evidence; 2nd, that no express promise by the defendant to pay the rent in the statement of claim mentioned was proved, and no, promise or liability to pay the same could be implied; 3rd, the amount of judgment was excessive, and the damages alleged to have been sustained by the plaintiff should be reduced by four-fifths, as the evidence showed that the plaintiff only paid one-fifth of the amount recovered.

It is admitted that Wilson never expressly promised to pay it, and, therefore, if any liability arises at all it must be by reason of the relation of the parties a promise is implied. It is denied that any promise is raised by implication. Had Potter sued Wilson he had a perfect answer in that Potter was overpaid.

The assignment was not of the whole premises, and therefore the assignee, the lessee, could not be sued by the landlord upon the covenant for rent: *Woodfull*, 11th ed., p. 235.

An agreement to assign, followed by possession, is not sufficient to give the lessor the right to sue the equitable assignee in equity on the covenants in the lease: *Woodfall*, 11th ed., p. 235, 236, 10th ed., 204; *Cox v. Bishop*, 8 T. M. & G. 815; *Moore v. Choute*, 8 Sim. 508; R. S. O. 98, sec. 4.

An assignee of part is liable to distress for the whole

rent, but not in debt for the rent: *Woodfull*, L. & T., 11th ed., p. 240, 10th ed., p. 209; *Curtis v. Spitty*, 1 Bing. N. C. 756. The distress is by virtue of the original lease: *Id.*, 760. The assignee cannot maintain an action before the assignment to him: *Woodfall*, L. & T., p. 240; *Martyn v. Williams*, 1 H. & N. 817.

The right of Briscoe to distrain was by virtue of the original lease, and was a right *in rem*, against goods on the premises, and not *in personam* against Wilson: *Curtis v. Spitty*, *supra*, 756. The lien is in respect of the place in which they are found, and not in respect of the person to whom they belong: *Woodfull*, L. & T., 11th ed., p. 396. As to implied promises and request see *Addison on Contracts*, 8th ed., p. 1035. Here there is no implied promise: *England v. Marsden*, L. R. 1 C. P. 529, distinguishing *Exall v. Partridge*, 8 T. R. 308; *Rodgers v. Maw*, 15 M. & W. 448. In any case plaintiff is only entitled to what he paid out, being one-fifth. If the others voluntarily paid what they were not bound to pay, they cannot recover it back: *Bilbie v. Lumley*, 2 East 469.

Bethune, Q. C., contra, referred to *Lampleigh v. Braithwait*, *Smith's* L. C. 158, 175, and contended that the agreement was to pay the rent from the time he got into possession, and that the goods having been left there at the defendant's request, he was bound to protect them.

February 16, 1884. CAMERON, J.—The plaintiff cannot hold the judgment he has obtained unless the facts shewn by the evidence establish a legal or equitable obligation on the part of the defendant to protect the goods claimed by the plaintiff under the chattel mortgage from seizure by the landlord for rent. There does not appear to have been any privity of contract or estate between the plaintiff and defendant. The contract was between him and Potter, and the privity of estate between him and Briscoe, the owner of the fee in the land as lessor of the term to Yates, which came to the defendant by the assignment from Potter of the 4th June, 1881. The rent distrained for

own the chattels or not does not appear. Potter, by his agreement with the plaintiff and Yates, was to pay into the bank to the credit of plaintiff certain weekly sums to be applied in payment of rent, taxes, and insurance, and any balance was to go in reduction of the purchase money of chattels. The evidence is silent as to whether the defendant was to continue these payments. It is not possible from the evidence to arrive at what was in fact the agreement between Potter and the defendant, but whatever it may have been, there was nothing to show that the plaintiff was in any way a party to it. If the defendant, in fact, bought Potter's interest in the goods there would be no obligation on his part to protect the mortgagee's interest. A mortgagor is not, by reason of his relationship to the mortgagee, bound to prevent the mortgaged goods from being distrained for rent after the mortgagee has taken possession: *England v. Marsden*, L. R. 1 C. P. 529; where a mortgagee having taken possession of the mortgaged goods and allowed them to remain on the mortgagor's premises without any express request from the mortgagor, and while they so remained, the mortgagor's family residing on the premises, a quarter's rent became due, for which the landlord distrained, the mortgagee having paid the rent and sued the mortgagor, it was held he could not recover.

Erle, C. J., at page 531, says: "The proposition which has been contended for on the part of the plaintiff is, that where the owner of goods places them upon the premises of another, and rent becomes due, and the landlord distrains the goods, and the owner pays the landlord's claim in order to release his goods, the payment so made is a payment made under compulsion of law, and may be recovered in an action against the tenant; and this *Exall v. Partridge*, 8 T. R. 308, is relied on. There is, however, one great distinction between that case and this. There Partridge was a coachmaker, and Exall at his request bailed his carriage with him. The landlord distrained it for rent, and Exall cleared it from

obligation upon him. The mortgage contract in this instance only enabled the mortgagee, on default in payment of the mortgage money, to take possession of the mortgaged chattels, and does not require the mortgagor to do anything whatever towards assisting the plaintiff in perfecting his title. The plaintiff, therefore, cannot succeed unless he is on the facts within the rule of law, that where one man is compelled to pay a debt for which another is legally responsible, the law will imply a promise by the latter to indemnify him, and which rule is stated in *Leake on Contracts*, page 41, thus: "Where the plaintiff has been compelled by law to pay, or being compellable by law to pay has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount."

This statement of the law was adopted by Cockburn, C. J., in *Moule v. Garrett*, L. R. 7 Ex., at p. 104, which was the case of the original lessee of a lease suing the ultimate assignee thereof after several mesne assignments, to recover an amount he was forced to pay to the original lessor for breaches of a covenant in the lease to repair committed by the defendants,—a case that would be on all fours with this case if there had been any privity of estate or contract between the plaintiff and defendant. The learned Chief Justice added: "Whether the liability is put on the ground of an implied contract, or of an obligation imposed by law, is a matter of indifference: * * It is such a duty as the law will enforce. The lessee has been compelled to make good an omission to repair which has arisen entirely from the default of the defendants, and the defendants are therefore liable to reimburse him."

If the plaintiff's goods had been shewn by the evidence to have been placed on the demised premises by the plaintiff at the defendant's request or for his benefit, or if they had been put there at like request of the defendant or for his benefit by a third person

who was liable to the plaintiff to make them good, the defendant being liable to pay the rent, and the plaintiff paid it, there would seem to be no doubt of the plaintiff's right to recover. But that does not appear to be the position of the parties on the evidence given. It did not appear that the defendant knew anything about the plaintiff's claim, though it is quite possible, and even most probable, that he did in fact know all about it; and it further appears that he asserted, and the assertion was true, if the note for \$500 that he paid was in respect of rent, that he had paid all his rent, as \$500 would have more than paid the rent for which he was liable, even if he is to be held liable from the 1st of February. For any rent before that he could not be held responsible, and it may be, as far as anything appears in evidence, that the plaintiff himself received in respect of the weekly payments made by Yates and Potter moneys that he ought to have applied in payment of rent, and neglected to do so.

The rent claimed by the landlord was in respect of a balance due on account of thirteen months' rent, which might indicate that the defendant's contention that he had paid his rent was well founded, and the landlord may have received it and credited it, as he had a right to do, on any arrears due to him up to the time; at all events, till the lease was formally assigned to the defendant, and he became directly liable to him by virtue of the privity of estate created by the assignment. It is somewhat singular that in the case of rent reserved payable daily, and which for thirteen months would amount to \$1,185, \$538 of arrears should be claimed as a balance of thirteen months' rent, instead of so many days, if there had been no question as to the application of the payments.

On the whole, I think the plaintiff has failed to *show* that the defendant was, at the time of the *distress* and agreement by the plaintiff to pay the *landlord* the rent to induce him to abandon the seizure, *under* any duty or obligation to pay such rent, and so: **payment** made by the plaintiff must be treated not

as a compulsory but a voluntary payment, as far as the defendant is concerned. The action should therefore be dismissed with costs; but if the plaintiff thinks his position can be benefited by a further investigation, he may have a new trial on payment of costs within one month; in default of payment of such costs judgment to be entered for defendant.

HACARTY, C. J., and ARMOUR, J., concurred.

Judgment accordingly.

[CHANCERY DIVISION.]

HAMILTON PROVIDENT AND LOAN SOCIETY V. CORNELL.

Fraud and misrepresentation—Personal representatives.

. having dissolved partnership with M., by the terms of the dissolution held certain land subject to a lien of \$525, to be paid by M. M. then arranged a sale to C. for \$2250, intending to defraud any company who would lend \$1125, on the security of the land (it being really worth about \$600), and drew up a receipt for \$1150, representing that sum as being part payment of the consideration money, which G. signed. G. subsequently executed a conveyance with \$2250 inserted as the consideration, and deposited it with his solicitor as an *escrow*, to be delivered up on payment of his \$525 lien. It appeared G. had since died, and S. was appointed his administrator. M. and C. by means of an overvaluation and certain misrepresentations, one of which was the production of G.'s receipt, obtained a loan of \$1125 from the plaintiffs to C., and out of the proceeds paid S. the \$525, and took up the deed. At the trial it was shown that the plaintiffs were aware of the death of G. before they acted on or even knew of the existence of his receipt, and that S. knew nothing of the transaction except that he was entitled to the lien for \$525.

Id., (reversing the judgment of PROUDFOOT, J.) that the plaintiffs could not recover against S. as representative of G., for no cause of action existed against G. at the time of his death, and S. had done no wrong.

the absence of fiduciary relationship no recovery can be had against the representatives of a deceased person who is charged with fraud unless profit has accrued to the wrongdoer's estate.

THIS was an action brought by the Hamilton Provident

Loan Society against Abraham Cornell, James

Carruthers, John Morris, and William F. Sanderson, to

recover the sum of \$1,125, being the amount of a loan

made by the plaintiffs to the defendant Cornell on 150

acres of land in the Township of Bosanquet, part of which,

valued at \$525, was claimed against the defendant Sanderson,

administrator of the estate of one John H. Gould,

deceased.

The plaintiffs claimed that by the fraud or gross negli-

gence of the defendant Carruthers, their paid valuator, the

value of the property in question was falsely represented as being

about \$1,900, and as having just been purchased by the

defendant Cornell at the price of \$2,500; while as a matter

of fact no such purchase had been made, and the land was not worth more than \$200; and that the defendant Cornell and Morris had colluded with Gould in his lifetime to defraud the plaintiffs by causing to be prepared and executed a conveyance of the said property from Gould to Cornell with the sum of \$2,500 inserted as the consideration therein, and concocted a false and deceptive receipt (set out in the judgment) for part of such consideration.

The deed had been left by Gould with his solicitors as an *escrow*, to be delivered up upon payment of the sum of \$525, and part of the proceeds of the loan was used for the purpose of taking it up, and Sanderson as his administrator received the \$525.

The action was tried at London at the Spring Sittings of 1883, before Proudfoot, J.

Muir, for the plaintiffs.

Idington, Q.C., for the defendant Sanderson.

Harding, for the defendants Morris and Cornell.

The following judgment was pronounced:—

PROUDFOOT, J.—In this case so far as the defendants Cornell and Carruthers are concerned, the case is quite clear: the plaintiffs are entitled to a remedy against Cornell upon the mortgage, and against Carruthers for his false representation, which he admits by not denying.

As to Morris, I think the case is also perfectly clear. I think that a more plain and clear case of an attempt to cheat the company, to enable Cornell to get a loan upon a false representation of facts, was never made out than was made out in this case against Morris. He sells this land for an apparent price of \$15 an acre; and, with regard to the value of it, I may say that the evidence, so far as it has been given before me, does not satisfy me that it is worth more than four or five dollars an acre at the outside. He professes to sell this land to Cornell at \$15 an acre. He arranges with Cornell that he is to get a loan to Cornell from the company: that money he is to raise from the company, and is to pay it down to Morris as the down payment upon the land, and then the timber

upon the land is to be stripped by Cornell and given to Morris, and for this he gives a receipt as if he had already received it. He gives a receipt shewing payment of \$1,150, I think, upon this land in lumber, but that was not the transaction. He did not get that at the time at all; he took a promissory note, and the promissory note was liquidated, it was to be liquidated by stripping the land of its timber and paying it over to Morris. A clearer case of fraud I can hardly imagine as against Morris, and if the remedy against him is worth anything, the plaintiffs are entitled to it.

The case is more difficult with regard to Mr. Idington's client Mr. Sanderson, or the person he represents, Gould; and I have had a considerable deal of doubt as to what is the proper way of treating that case, but looking at the evidence of Morris I doubt whether I can allow Sanderson to escape.

The application was made on the 29th March. It is clear that the application was a fraud, both on the part of Cornell and Carruthers as well as Morris, and on the 9th April, for the purpose of strengthening the application and giving an air of verity to it, Carruthers represents that he has seen the receipt for \$1,150, said to have been paid upon this property, and there is no doubt that the receipt that he refers to is the receipt now produced, because he afterwards, on the 28th June, I think, sends that same receipt to which he had previously referred, and the notice of the company is brought then to this receipt, and I must assume, in the absence of evidence to the contrary, that they relied upon that as one of the instruments of title, as one of the indicia by which they were to be guided in ascertaining how much they would be justified or safe in lending on the security of the land. Now, if Gould, being in the position of a partner in a dissolved partnership and holding the land only as a security for the amount due to him, had merely stated the facts, there would be nothing to complain of; but he goes further—he signs a receipt which is not a fact, and which he says he knew was to be used upon this application. Morris's evidence is, that the arrangement between him and Cornell was, that the application was to be made in the name of the company, and that Gould knew of it. "Gould knew the bargain" he says. "He talked about the bargain he sold to Cornell for \$15 an acre. "He was to pay the money he was to get from the company, and he was to

"Give me a note for the balance." Gould knew of the bargain; he knew that they were to get the money from the company, which was to be a down payment, yet he signed the receipt which says that the down payment had already been made, \$1,150, and that it would be so represented to the company, because the application was to be made on the basis of it.

I take it also that the evidence shews that Gould was aware of the intended application to the company, and he was aware of the nature of the bargain between Cornell and Morris; and the signing of this receipt was then an act of such gross negligence, or of such complicity in the transaction that he ought to be made responsible for it. Then, it has been strongly urged that they did not rely upon it. But it is sent in as one of the evidences of the value of the property. What other evidence is needed of relying upon it I do not know. You do not require to shew, when application is made, that you rely upon every statement in the application; the fact of these statements being made is evidence of the reliance of the company, because that is the basis upon which they proceed in granting the loan. I think that they must be taken to have relied upon that in the absence of evidence to the contrary.

Now Gould is not attempted to be made responsible upon a representation of value merely, because that is a matter of opinion, and upon which one man might differ from another, and no two men be alike in going over the whole neighbourhood; but the ground upon which he is sought to be made liable, and upon which I think he must be held liable, is representation of a matter of fact, of payment having been made on the 19th January, by lumber, or something else, of \$1,150 upon this land. The correspondence upon which Mr. Idington relied very much, certainly shows that he acquainted the solicitors of the company of the position of Gould, that he only held the deed as security for the amount due to him.

Very truly they did not seek to make him responsible upon the ground of having had any further interest, but the action is brought rather for the purpose of making him liable for a misstatement of fact, independently of the amount of interest he might have had in it. He does not seem to have personally profited by the transaction, but rather to have injured himself by it; and if there was any way in which he could be protected, at the same time

paying the company, I would be very willing to do it : but I think that all the defendants must be held responsible in this proceeding to the company, for any damage that may be sustained. The lands will be sold as soon as the parties choose, and the defendants will have to answer for the deficiency.

I think it better to dispose of the case now, so that Mr. Idington may have an opportunity of bringing it on for a rehearing at the next sitting of the Court, if he should choose to do so.

I confess it is not a case absolutely clear ; but it seems to me, upon the evidence, that the conclusion I have come to is the fair and natural result of the evidence.

With regard to the three defendants, Morris, Cornell, and Carruthers, I have no doubt at all. I think it is a clear case of fraud and conspiracy with regard to them.

Judgment against Sanderson only to the extent of \$525. Decree for plaintiffs, with costs; property to be sold, defendants to make good deficiency to Sanderson to extent of \$525. Reference to the Master at Hamilton.

On September 13th, 1883, the defendant Sanderson, moved by way of appeal to the Divisional Court before Boyd, C., and Ferguson, J.

Idington, Q.C., for Sanderson. When Gould died representation was at an end ; and as the plaintiffs had sustained no damage, they could not then have sued, and the action died with him. If injury did not occur before death, they cannot complain of what happened afterwards : *Williams* on Ex., 8th ed., p. 1735. If they seek to charge the administrator with the proceeds of the loan received by him, his lien for \$525, which Gould had on the land, should be restored. There should be no relief against Gould's estate, for when plaintiffs became aware of Gould's death, the false representation (if any) was at an end, and they dealt with another man who had become entitled to the lien : *Kerr* on Frauds, p. 271 ; *King v. Hamlet*, 2 Myl. & K. 456 ; *Savary v. King*, 5 H. L. Ca. 627. Gould was not connected with the transaction or fraud at all. Morris's evidence was misunderstood. If plaintiffs relied

on the receipt, Sanderson was entitled to know it. Representation in the receipt is not material. As to price, see *Wood v. Schultz*, 6 S. C. R. 621. Morris's evidence shews the valuator viewed the premises, and this shews the plaintiffs did not rely on the receipt: *Silverthorn v. Hunter*, 26 Gr. 390.

Muir, for plaintiffs. *Power v. Rees*, 7 A. & E. 428; *Hanbly v. Trott*, Cowp. 375, are authorities shewing that such an action as this lies, and that the estate of the wrong-doer is liable to the extent of the benefit derived from the wrongful act. The representation by Gould that a sale of the property to the defendant Cornell had been effected, was the chief ingredient of valuation relied upon by the board of directors when passing the loan, and thus he aided and assisted in a scheme to deceive and defraud, without which aid and assistance nothing could have been accomplished by the others. The wrong-doing was complete before Gould's death, and that which transpired afterwards was simply the carrying out of what had been agreed upon. It was not incumbent on the plaintiffs to inform the administrator that they were relying upon representation made by Gould in his lifetime, because they were not to presume that Gould had committed a fraud. The plaintiffs cannot be called upon to restore any lien, because they are purchasers for value without notice, and because the lien was given up, not to the plaintiffs, but to other persons. The plaintiffs were not relying upon the receipt simply as an instrument in writing, but upon the transaction of sale by Gould to Cornell.

December 12, 1883. *BOYD, C.*—The dates in this case are material. Gould and Morris dissolved partnership in August, 1879, and by the terms of the dissolution the land in question, with other land, was held by Gould as security for a lien of \$525 to be paid to him by Morris.

Morris arranged to sell the land in question to Cornell for \$2,250, at the rate of \$15 an acre, upon a scheme intended to defraud any company who could be induced to lend

\$1,125 on the security of the property. This price was to be paid by means of a loan for that amount which was to be paid to Morris, and the other \$1,125 was to be paid by stripping the place of timber and paying the proceeds to Morris. To give a substantial appearance to the transaction, Morris drew up a receipt, which he asked Gould to sign, in the following words :

" Recd. from Abraham Cornell the sum of eleven hundred and fifty dollars worth of lumber and timber in part payment on lot No. 20, and half 19, being the South-westerly half of said lot, Lake Road East, in the Township of Bosanquet and Lambton County, the said lumber and timber to become the property of John Morris of the village of Thedford, in part settlement with him.

" Thedford, (Signed) " J. H. GOULD.

" Feby. 19th, 1880.

" Witness by
(Signed) " JOHN MORRIS."

This was signed, as Morris says, by Gould, to shew that he, Gould, had no claim.

I judge from the evidence that Gould did not know the terms of the bargain apart from the information which may be imputed to him from his signing the receipt

The application was made to the plaintiffs through their agent, the defendant Carruthers, by Cornell for a loan of \$1,125, on the 29th March, 1880.

The day the receipt was signed it was arranged that Gould was to give a deed of the land, in which the consideration was to be put at \$2,250. The conveyance was accordingly signed by Gould on the 5th April, and deposited with his solicitors as an *escrow* to be delivered on payment of the \$525.

The receipt of the 19th February was not in the hands of any officer of the company until the 28th June, when, on the request of the company's solicitor, it was transmitted to him by their valuator Carruthers.

Gould died on the 10th April: the company heard of his death a few days afterwards, and long before the money was advanced in the month of July.

Sanderson, Gould's administrator, knew nothing of the receipt or of the facts of the case, save that he had a lien for \$525 on the conveyance executed by Gould in the hands of his solicitors. The fraud charged in the pleadings against Gould is the giving of this receipt.

Upon the advance made by the company, one-half of it \$525 was paid to Sanderson, to satisfy the lien and perfect Cornell's title to the land.

By the judgment under review the administrator is made to refund this \$525 and pay costs.

It may be argued that Gould knew of an intention to use this receipt in some application for a loan, and that he knew of the terms of the bargain between Morris and Cornell; but there is no clear evidence of it. Rather, in my opinion, does the evidence make against his being aware of the details of the bargain between these two, except as manifested in the receipt. I should hardly infer from the evidence that there was a guilty purpose in Gould's mind when he signed the deed and the receipt, and in my view more clear and satisfactory proof should be afforded before a man is found guilty of deliberate dishonesty, especially when death has sealed the man's own lips.

The evidence does not distinctly go further than this, that Gould simply executed the deed, (to save the expense of two conveyances,) and signed a receipt drawn up by Morris, at Morris's request. No use appears to have been made of the deed in procuring the loan, and no use of the receipt, except the transmission of it to the company's solicitor, on the 28th June, and the probable mention of it in the letter of the valuator, which I proceed to refer to.

The company, on 5th April, resolved to lend \$1,150, provided the applicant, Cornell, had paid \$1,150 of his own money on the purchase; and in response apparently to this requisition, Mr. Carruthers wrote to the manager, on 9th April, 1880, thus: "I am satisfied of Mr. Abram Cornell has satisfied the selar (a) of the farm in question. I sa

the receipt, and, to the best of my knowledge it is correct, so that Mr. Cornell can give a clear title of the farm." Probably before that letter reached the company, Gould was dead. He was so to their knowledge before it was acted on.

I proceed to refer to the authorities, remembering the observation of Bramwell, B., in *Swift v. Jewsbury*, L. R. 9 Q. B. 315: "No doubt there are cases in which a man may be charged with having committed a fraud when he has not committed it himself; but I think that doctrine ought to be held in as few cases as possible."

In *Garth v. Cotton*, 3 Atk. 767, Lord Chancellor Hardwicke said: "In all cases of fraud the remedy does not die with the person, but the same relief shall be had against his executor. Collusion in this Court is the same as fraud." *S. C.* 1 Dick. 183; 1 Ves. 524, 546.

This is too broadly put in view of later decisions. What is meant is substantially an affirmance of the doctrine more clearly enunciated by Leach, V. C., in *Lansdowne v. Lansdowne*, 1 Madd. 138, that is, where a person dies having converted to his own use money produced by his wrongful act, upon general principles, independent of decisions, his assets ought to be liable in the hands of his executors to pay in respect of his conduct, such assets having been augmented by it.

This doctrine is not peculiar to equity, but was recognized in much the same terms by Lord Mansfield in *Hambly v. Trott*, Cowp. 376-7, in which it is thus put: Where the cause of action is a tort, or arises *ex delicto*, then the action dies with the offender, "if it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer. * * But where, besides the crime, or tort, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. * * All private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged."

In the absence of fiduciary relationship, no recovery can be had against the representatives of a deceased person who is charged with fraud, unless profit has accrued to the wrongdoer's estate : *Powell v. Aiken*, 4 K. & J. 343, 358 *Peck v. Gurney*, L. R. 6 H. L. 393; *Kirk v. Todd*, 21 Ch. D. 488; *Young v. Wallingford*, 31 W. R. 838.

An example of the excepted case where there has been a breach of trust or duty by two persons and the whole benefit has been received by one, yet liability attached to the representatives of the other who gained nothing from the fraud, is to be found in *Walsham v. Stainton*, 1 DeG. J. & S. 678, and another in *Sawyer v. Goodwin*, 36 L. J. Ch. 578.

Another example of the exception is where the persons guilty of fraud are partners. There the death of one who has not profited by the fraud does not preclude the following of his estate in order to make it liable in common with his surviving partner: *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. pp. 117, 118; *Rawlins v. Wickham*, 3 DeG. & J. 316. But none of these authorities apply to the peculiar circumstances of the present case.

Here the cause of action is grounded on deceit charged against the late John H. Gould, and it is sought to make his estate liable on account of that fraud to the extent by which it has benefited thereby. But upon the facts it appears that no cause of action for deceit existed as against Gould. He died before the untrue receipt affected the plaintiffs. It was not known to the plaintiffs, nor submitted to them, nor acted upon by them in any manner before his death; and before it was submitted to them they knew that he was dead. All cases where assets are followed into the hands of the personal representatives because of his testator's fraud, are cases where the cause of action accrued in the testator's lifetime. But where no fraud was consummated by the testator, as where untrue representations made by him are not acted on until after there is knowledge of his death, the reason of the rule which permits assets to be followed disappears.

No benefit resulted in this case to the estate by reason of any actionable wrong on the part of the deceased.

If the company did act on the receipt in question (which I doubt) yet they did so at a time when they knew Gould was dead. His administrator has been guilty of no wrongdoing, and has come into possession of the \$525 not as the fruits of a tort perpetrated by the intestate, but as representing the amount of the lien on the land secured by the deposit of the title deeds. This last consideration is also a formidable obstacle to the plaintiffs' right to succeed unconditionally. If the transaction is to be repudiated, there should be a restoration of the *status quo ante*. The defendant Sanderson gives up and discharges this lien of \$525 because he believes it to be satisfied by the money which is paid him out of the loan. If the plaintiffs are going to take that from the estate on the ground of the fraud of the intestate, they should replace the administrator in his former position as to his securities. See *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1278, and cases there cited.

The case may be viewed in another aspect. Assume that the receipt was signed by the deceased Gould with a fraudulent intent, yet before it was acted on to the prejudice of the plaintiffs he dies, and notice of that fact reaches them before they act. Is not the death in such circumstances tantamount to a withdrawal of the representation, or such a countermand of it as will, if nothing further is done, relieve him and his estate from liability? When he died there was no cause of action for deceit, because no acting on the misrepresentation by the party complaining of it: *Joliffe v. Baker*, 11 Q. B. D. 269. When, then, did the cause of action for deceit accrue?

The constant endeavour of this Court is, according to the well known phrase, "to prevent testators from sinning in their graves." Why should the policy of the Court be reversed in this case? Is the man who makes a fraudulent representation to be in a worse plight if he dies than if he lives? Living, he could have withdrawn his repre-

sentation before it was acted on. Does death fix him and his estate with an inevitable liability when advances are made, as in this case, thereafter, by one who knows he is dead?

The true result in such a case appears to be this; if the party holding the written representation desires to make the estate of the deceased with liability, then it is his duty to make known to the representatives of that estate what is about to be done, *i. e.*, as in this case, that an advance of money is about to be made on the faith of what is contained in the deceased's representation held by the company. The representatives can then adopt it or reject it, and their liability will vary accordingly.

Without further elaboration of the matter the conclusion appears to me irresistible that the action fails as against the personal representative of Gould, and he is entitled to have it dismissed, with costs.

FERGUSON, J., concurred.

G. A. R.

[COMMON PLEAS DIVISION]

DONOVAN V. HERBERT.

Trespass—Entry on land to maintain action—Possession—Statute of Limitations—Offer to purchase—Estoppel.

Actual occupation of land is not essential to give a right to maintain trespass by one who has the legal title. It is sufficient that he enter upon the land so as to put himself in legal possession of it.

Id., that putting up boards on the land by the owner, stating that the land was for sale, was a sufficient entry upon his part to vest the legal possession in him to enable him to maintain formally an action of trespass.

In 1853 M., the owner of the land in question, conveyed it to P. D., who in 1859 conveyed it to L. D. Neither P. D. nor L. D. ever entered into occupation of the lot, which was a vacant one. In 1855 the defendant, who was a builder, with the knowledge and consent of P. D., used the lot for depositing his building materials on, and had continued to do so ever since, but with the like knowledge and assent of L. D. after his purchase. In 1876 L. D. fenced the lot, leaving a gate for defendant's convenience; he also planted a small portion of it, and allowed soil to be taken from it to level it. In 1877 P. D. was declared insolvent, and S., the assignee in insolvency, filed a bill in Chancery to set aside the deed of 1859 from P. D. to L. D., as having been made in fraud of creditors. In 1879 defendant contracted to purchase the lot from L. D. for \$2,400, on which he paid \$300. In 1880 a decree was obtained setting aside the deed of 1859, which was affirmed on rehearing. This was affirmed on appeal, defendant being surety for L. D. for the costs of the appeal. He had never paid any taxes on the lot. In 1880 nine feet of the lot were sold for taxes, and defendant became the purchaser; but it was redeemed.

Held, under these circumstances the defendant's possession was not such as to give him a title under the Statute of Limitations: that the plaintiff was not shewn to have been dispossessed, or to have discontinued the possession: that the agreement by defendant to purchase was evidence to preclude him from setting up a title by possession against the plaintiff, as was the fact of his having become security for L. D. in supporting his, L. D.'s, title.

ACTION for trespass to lots 17 and 18, on the east side of Seaton street, in the city of Toronto, according to plan 12, registered in the registry office for the city of Toronto.

1. The plaintiff stated that he was on the 12th of April, 1883, and still is owner of these lots.

2. That the defendant is the owner of lot 16 adjoining the lots of the plaintiff on the south, and separated therefrom by a line fence, and the defendant resides thereon.

3. That the defendant for some time before the 12th of April, 1883, was accustomed to make use of the plaintiff's lots, which were vacant and unoccupied, by depositing builder's material and scaffolding thereon, and by traversing the same as a pathway to his residence, without the permission of the plaintiff.

4. That on the 12th of April, 1883, the plaintiff notified the defendant to remove whatever material he had deposited on the plaintiff's lots, and to abstain from further trespassing thereon, but the defendant has refused so to do, and he claims to be the owner of the said land.

And the plaintiff claims damages, and an order restraining the defendant from the repetition of any of the acts complained of, and such other relief as the case may require.

1. The defendant admits the second paragraph of the statement of claim, excepting that the plaintiff is the owner of the said lots 17 and 18.

2. The defendant says he is owner of the said lots, and is in possession of them.

3. The defendant denies the plaintiff was the owner or in possession of the said lots, as alleged in the first paragraph of the statement of claim, or that he is now owner.

4. The defendant denies the alleged trespasses.

5. The defendant claims the benefit of the Statute of Limitations.

6. The defendant submits it should be declared by the Court that he is now, and was before and at the time of the commencement of this suit the owner in fee of the said lots in question. Issue.

The cause was tried before Osler, J., without a jury, at Toronto, at the Summer Assizes of 1883.

The facts from the evidence given at the trial, appeared to be as follows: The lots in question before and at the sale in 1853 belonged to one McMahon. He in 1853 sold the lots to Patrick Doyle.

It did not appear Patrick Doyle ever took possession—no one since that sale has ever occupied the land. There did not appear to have been a house upon it. It has since the sale been a vacant lot, excepting in so far as the defendant has made use of it for keeping his building materials upon it. The defendant has continued to use the land for that purpose since about the year 1855, to the knowledge and assent of Patrick Doyle, and Lawrence Doyle, to whom Patrick made a conveyance.

the land to Thomas W. Fisher, for \$2,450. Fisher, i appeared, bought as trustee for the plaintiff. On 1st June, 1881, Fisher, by deed, conveyed, at plaintiff's request, t Edwin Crickmore, who also took it in trust for the plain-tiff; and on the 16th December, 1881, Crickmore conveye to the plaintiff.

On the 12th of April, 1883, the plaintiff served the defendant with notice to remove the building material from the land, upon which the defendant took the advice of his legal adviser that he could hold the land by length of possession. Until that time he was not aware he could set up a title by possession to the land as his own.

In December, 1880, nine feet of the land was sold for arrears of taxes, and the defendant bought the same, but the plaintiff in December, 1881 redeemed the land by payment of the taxes amounting to \$267.15. The defendant never paid any taxes.

The learned Judge gave judgment for the defendant, with costs.

The plaintiff served notice of motion to set aside the verdict and judgment thereon, or to have a new trial ordered, on the ground that the verdict was against law and evidence: that there was no possession by the defendant to bar the plaintiff's claim: that the possession of Lawrence Doyle enured to the benefit of those who subsequently acquired the land: that no claim under the Statute of Limitations could operate against the decree of the Court of Chancery, or in favour of Patrick or Lawrence Doyle, or of the defendant who claimed under them: that the plaintiff was taken by surprise at being called upon to prove his title, as in an action of ejectment, and not supposing that any evidence could be given under the Statute of Limitations; and referring to the affidavits and papers filed.

At the Michaelmas Sittings, December 6, 1883, *McCarthy*, Q.C., and *O'Donohoe*, Q.C., shewed cause. The plaintiff never had possession of the land and so could not main—

tain trespass: *Street v. Crooks*, 6 C. P. 124; *Jowett v. Haacke*, 14 C. P. 447. The defendant had the possession of the land. He had acquired title by possession under the Statute of Limitations: *Heyland v. Scott*, 19 C. P. 165; *Dundas v. Johnston*, 24 U. C. R. 547. The contract for sale between Lawrence Doyle does not help the plaintiff, because it turned out he had no title to the land, and the plaintiff does not claim under him, but adversely to him: *Hooker v. Morrison*, 28 Gr. 369. The defendant had held possession for more than twenty years before the bill was filed to set aside the deed from Patrick to Lawrence Doyle.

McMichael, Q.C., supported the notice of motion. The kind of possession which the defendant relies upon to make out a title under the Statute of Limitations will not confer upon him a title to the land. The land was an open, unenclosed lot; the defendant lived next to it and made use of it to put the materials, scaffolding, &c., of his trade of builder, never at any time occupying the whole land, nor for any length of time occupying the same part of the land, and not even claiming title to the land until just about the commencement of this action. Lawrence Doyle took soil from the land, fenced it, and put a gate in the fence for the defendant's convenience. The plaintiff can take the benefit of those acts of Lawrence Doyle, for he had a good title from Patrick; it was void only as against the creditors of Patrick. The defendant was tenant at will of the land, and in 1859 when Patrick conveyed to Lawrence, that tenancy was put an end to, and the defendant's title cannot be put further back than the date of that conveyance. The plaintiff is not in any way bound by the statute. The decree in Chancery which was made in favour of the assignee in insolvency of Patrick Doyle conferred upon him a title at and from that time as against Patrick and Lawrence, and that decree was made as late as November, 1880. The case of *Heath v. Pugh*, 6 Q. B. D. 345, affirmed in 7 App. Cas. 235, shews that an order for foreclosure obtained by a legal

mortgagee vests the ownership and beneficial title to the land for the first time in the mortgagee, so that an action brought within twenty years next after the order by the mortgagee to recover possession of the land has been held since the Judicature Act to be not barred by the Statute of Limitations, although more than twenty years have elapsed since the legal estate in the land has been conveyed to the mortgagee, and since the last payment of principal or interest secured by the mortgage. The affidavits filed on the motion shew that the plaintiff is entitled to a new trial, if necessary, for the purpose of offering further evidence as to the nature of the defendant's possession.

February 9, 1884. WILSON, C. J. — The plaintiff has unquestionably the paper title in his favour. There are two exceptions however made to his recovery.

The first is, that he cannot maintain this action of trespass, because he has never at any time had possession of the land alleged to have been trespassed upon, and the second is that he has no title to the land, as the title to it has vested in the defendant by length of possession.

The plaintiff in his evidence said he had never been in occupation of the land nor any one for him. He also said he complained of the defendant for trespassing on the land by knocking down the boards which he, the plaintiff, had put up on the lot with the words *for sale* upon them.

Actual occupation of the land is not required to give a right to maintain trespass by one who has the legal title.

It is sufficient that he enter upon the land so as to put himself in legal possession of it.

An actual entry made for the purpose of taking possession is sufficient evidence of the actual possession of the land by the legal owner. Cutting down a tree, digging the soil, taking any profit, putting any beasts upon the ground, or commanding it to be done; "these do amount to an entry:" *Co. Litt. 245b*. The reason is "for rather than the bastard," (the party entered upon by the mulier)

"shall punish him" the mulier "in an action of trespass, the act shall amount in law to an entry because he hath a right of entry:" *Ibid.* See also *Barnett v. Earl of Guildford*, 11 Ex. 19.

So also an entry upon the land by the owner or his tenant at will, and doing any act upon it which would be a trespass if the tenancy were to be construed as subsisting, will be construed to be a determination of the will rather than act of trespass by the owner: *Turner v. Doe d. Bennett*, 9 M. & W. 643.

In this case the act of putting up boards upon the land by the plaintiff as owner stating that the land was *for sale*, was an act which shewed the intent of the plaintiff to be to claim the land as owner, and was an act also which was a plain act of trespass on his part if he erected these boards without a legal title to justify his act, and in my opinion the act he did was a sufficient entry upon his part to vest the legal possession in him to enable him to maintain formally the present action of trespass.

If it were not so I should be disposed to allow the plaintiff to amend his statement of claim by adding a paragraph for the recovery of the land.

The other part of the case is whether the plaintiff has maintained his claim to the land as against the defendant's assertion of title by possession?

The defendant's claim alleged is as follows: Patrick Doyle having bought the land in 1853, (no other more precise date is given), from one McMahon, suffered the defendant to use the land for laying his building materials upon, the defendant being a builder, and requiring some place to put his scaffolding and the other articles of his trade upon, and he began to do so in 1855, no more exact date being given; and he says he has had possession ever since, and he has done some filling up and leveling of the land.

Murphy, a witness for the defendant, said he had known the defendant in possession of the land "not far from twenty-five years," and the witness has lots abutting on

the defendant's land, not, however, the property in question. The defendant used the land in question for scaffolding poles, materials, and trestles

Bartnell, another witness for the defendant, said he has known this land for twenty-five years, and he has known the defendant "to be dealing with it somewhere upwards of twenty years. I live right close to it."

Lawrence Doyle said he thinks the defendant was using the land three or four years before he Lawrence got the deed in 1859, as I understand the evidence. Whether the year 1855 is to be taken as the year the defendant began to use the land for placing his building materials upon, "or three or four years before 1859," as *Lawrence Doyle* says, "or not far from twenty-five years" as *Murphy* said, that is from the date of the trial in June, 1883, which will make twenty-five years, if so long be allowed, to extend back to 1858, "or somewhere upwards of twenty years," according to *Bartnell*, which will relate back to about 1863, or somewhere further, but how much further, does not appear.

The beginning of the defendant's possession, if it be called so, is not very clearly shewn. It varies from 1855, as he says, to somewhere farther back than 1863, and it may be doing the defendant no injustice to place the beginning of his user of the land between the years 1855 and 1860.

The first question on the evidence is, whether the defendant's user of the land for putting his building materials upon it is and has been such a possession of the land as to operate upon the right or title of the true owner in like manner as working and cropping the land, or dwelling upon it would have operated?

The defendant said: 1. *Patrick Doyle*, then the owner of the land, said, soon after the defendant began to use it "that I might use it as long as he was not making any use of it." 2. "*Lawrence Doyle* put up the fence" on the lot. "I think it was put up about seven years ago:" that would be in 1876. "I put the gate in the fence." 3. "*Lawrence Doyle* planted it one year, a small portion of it, as I had stuff on the place." 4. "I agreed to purchase the

defendant was using or dealing with the land, but he never set up or pretended to any actual right as against the true owner to have title to it, or to own it, and the owner from time to time planted, hauled soil from it, and fenced it without the leave of the defendant, and without being opposed by him upon any of these occasions, and the defendant contracted with Lawrence Doyle in 1879 to buy the land from him.

In *Leigh v. Jack*, 5 Ex. D. 264, the defendant placed materials upon a piece of land for upwards of twenty years, which had been reserved by the owner for a highway, and the defendant had bought from the plaintiff a parcel of land bounded by that intended street, and it was held that such long user by the defendant of the contemplated street without interference by the true owner was not a dispossession of or discontinuance by the true owner of the intended street, because the acts of such user were not inconsistent and did not interfere with the purpose to which the owner intended to devote the land.

Cockburn, C. J., said, at p. 27: "It was intended by the parties to the conveyances that a way should run in front of the pieces of land granted by J. S. Leigh," the proprietor, "and that, subject to this burden the soil should remain in him and his representatives. I do not think that any of the defendant's acts were done with the view of defeating the purpose of the parties to the conveyances; his acts were those of a man who did not intend to be a trespasser, or to infringe upon another's right. The defendant simply used the land until the time should come for carrying out the object originally contemplated. If a man does not use his land either by himself or by some person claiming through him, he does not necessarily discontinue possession of it."

Bramwell, L. J., said, at p. 272: "If the plaintiff and her predecessors had done nothing for twenty years to Grundy street and Napier Place, it might have been possible to argue that there had been a discontinuance of possession. But after all, it is a question of fact, and the smallest act would be sufficient to shew there was no discontinuance."

The case of *Sanders v. Sanders*, 19 Ch. D. 373, shews the Court does not look upon a defence of the Statute of Limitations with much favour when the parties have not been acting upon it as if it were binding upon them.

I do not doubt that the defendant, if he had entered upon the land with or without the assent of the owner and used it in the manner he did for more than the statutable period without interference or objection, would have acquired a title by length of possession, but that is not the case before us, and I desire to say I have not changed my opinion, respecting the kind of possession which will divert or change the title, as expressed in *Davis v. Henderson*, 29 U. C. R. 344.

The next question is, assuming the defendant to have had possession of the land. Has the plaintiff and those from whom he claims been dispossessed, or have they discontinued the possession, or has the defendant had the possession for the statutable length of time to give him a title to the land?

If the year 1855 be taken as the time when the defendant first entered—and he does not profess to go further back than that year—he shews that soon after he entered he had the assent of both Patrick and Lawrence Doyle to use the land for the purpose of putting his building materials upon it until it was required of him. That would constitute him tenant at will, and that tenancy would expire in 1856. Then seven years before the trial in 1883, that is, in 1876, Lawrence Doyle entered upon it, no one then living on the place; and that, in my opinion, maintained the title against the defendant, and was sufficient to shew there was no discontinuance.

In 1876, the time required to bar the title was twenty years. The 38 Vic. ch. 16, sec. 1, R. S. O. ch. 108, sec. 4 shortened the time to ten years, but that time did not apply till the 1st of July, 1877.

If the title against the defendant was protected by the putting up of the fence in 1876, and the defendant's title by length of possession was completed in that year, it was

for the defendant to prove his full statutable period of limitation, so as to give him, as it is called, a parliamentary title. He should have proved that period had run in his favour before the entry was made to put up the fence. Not having done so, he has failed to prove his title under the statute, and it is not a case in which he is entitled to any kind of relief or favour.

Besides that, he has not shewn the removal of the soil from the place and the planting of it were not done within the statutable period.

I am therefore of opinion, if the defendant had such possession which might have been perfected by length of possession into a good title, that such length of possession has not been proved.

The acts of ownership by putting up the fence and the like were done by Lawrence Doyle, but he did so under a title which he had from Patrick Doyle and valid as between him and Patrick, but void as against those from whom the plaintiff claims and who have a preferential title from Patrick as against Lawrence, and as against the defendant also.

There is a third question to be considered, that is, the effect of the defendant's agreement by deed of the 17th of May, 1879, to purchase the land from Lawrence Doyle?

As between these two it was an estoppel against the defendant. It was evidence, according to *Sanders v. Sanders*, 19 Ch. D. 373, that the Statute of Limitations had not conferred upon the defendant a valid title; and as Lawrence claimed under Patrick Doyle, and as the plaintiff has the preferential title to Lawrence under Patrick, the bar against the defendant by reason of the contract made with Lawrence Doyle excludes him from setting up the Statute of Limitations, if he otherwise could do so against the plaintiff.

The fact too that the defendant by his suretyship for Lawrence Doyle in supporting Lawrence Doyle's title to the land within a very short time past is evidence that

he, the defendant, had not a good statutory right to the land at that time.

In every view of the case the defendant's title, in my opinion, fails, and the plaintiff is entitled to recover in this action.

The finding of the learned Judge will therefore be set aside, and the finding will be :

1. That the plaintiff on the 12th of April, 1883, was, and still is the owner of the land in the first paragraph of the statement of claim mentioned, and the defendant was not and is not the owner thereof, as he alleges.

2. That the defendant did commit the acts of trespass in the fourth paragraph of the statement mentioned.

3. The plaintiff had rightfully the possession of the said lands before and at the time of the commencement of this action.

4. The defendant had not nor has a title by length of possession, and is not entitled to the benefit of the Statute of Limitations.

5. And the Court assess the damage of the plaintiff at the nominal sum of one dollar.

6. And that judgment be entered for the plaintiff accordingly, with the costs of the action and of this motion.

The order will be made as above stated.

Judgment accordingly.

MEMORANDA.

On the seventeenth of November, 1883, the Honorable FEATHERSTON OSLER, one of the Judges of the Common Pleas Division of the High Court of Justice for Ontario, was appointed a Judge of the Court of Appeal for Ontario, with the title of Justice of Appeal.

On the fourth of December, 1883, JOHN EDWARD ROSE, *Esquire*, one of Her Majesty's Counsel learned in the law, was appointed a Judge of the Common Pleas Division of the High Court of Justice for Ontario, in the place of the Honorable FEATHERSTON OSLER, appointed Judge of the Court of Appeal.

[QUEEN'S BENCH DIVISION.]

GILES v. MORROW.

Action for dower—Motion to set aside report—Time for moving.

The report in an action of dower was filed on 29th May, during the Easter Sittings of the Court. A motion was made against it within the first four days of the Michaelmas Sittings.
Held, that the motion was too late, for it should have been made to a Vacation Judge under Rules 482 and 483.

February 9, 1884. This was an application, by *McPhillips*, to set aside an assignment of dower under the statute, on various grounds.

G. T. Blackstock shewed cause on the merits, and also on the ground that the application had been made too late, referring to *Rooney v. Rooney*, 29 C. P. 347, 4 A. R. 255; *College of Christ Church Hospital v. Martin*, 3 Q. B. D. 16; *Re Moyle and the City of Kingston*, 43 U. C. R. 313.

The report was filed 29th May last, during the Easter Sittings, and the application was not made till the 4th November, during Michaelmas Sittings.

The whole question was, whether the applicant was not bound to move under the statute within the first four days of the then next Term, *i. e.*, what used to be Trinity Term, commencing on the first Monday after the 21st of August.

March 8, 1884. HAGARTY, C. J.—The case of *Rooney v. Rooney*, 29 C. P. 347, was before the Judicature Act. A verdict obtained at the June Assizes in Toronto was not moved against within the first four days of Trinity Term, the Court having dispensed with its sittings during that term under R. S. O. ch. 39, sec. 13.

Section 13 is referred to, which allows a motion for a rule affecting any verdict at the Summer Assizes to be made and heard by the Judge sitting for the full Court during

Vacation. A rule had been obtained from a Vacati— On
Judge on the 3rd September, after Vacation, bef— re
Michaelmas Term, and the Court in Michaelmas Te— m
made absolute a rule to enter a nonsuit.

The Court of Appeal upheld this decision: 4 A. R. 2 55.

Mr. Blackstock relies on a case there cited: *College of*
Christ Church Hospital v. Martin, 3 Q. B. D. 16, 50
Appeal.

It was a motion to set aside an award under Statute
& 10 Wm. III. ch. 15, sec. 2. A motion to set aside an
award must be made before the last day of the next Term
after publication.

The award was made on the 28th March, and the motion
was not made till after the 8th May. Easter Term under
the former procedure would have begun on the 15th May,
and ended on the 8th June.

The Queen's Bench refused the rule as too late.

The Judicature Act, 36 & 37 Vict. ch. 66, sec. 26 (Imp.),
provided that the division of the legal year into Terms
should be abolished, "so far as relates to the administra-
tion of justice, and there shall not be Terms applicable to
any sitting or business of the High Court of Justice *

* but in all [other] cases in which, under the law now
existing, the Terms into which the legal year is divided are
used as a measure for determining the time at or within
which any act is required to be done, the same may con-
tinue to be referred to for the same or the like purpose,
unless and until provision is otherwise made by any law-
ful authority."

Our Judicature Act, sec. 18, is to the same effect, omit-
ting the word "other" marked above in brackets.

The Court held the application too late. Cockburn, C.J.,
said he felt the inconvenience that might result from the
operation of the clause, but that it was *casus omissus*: that
the Statute of William, not affected by this legislation, pre-
scribed the period for applying: "It refers to that parti-
cular period called a 'term,' which is abolished except for
certain special purposes. But among these special pur-

poses is such an application as the present. * * Terms still exist as a measure for determining the time at which an award under 9 & 10 Wm. III. ch. 15, should be set aside."

See also *Re Moyle and City of Kingston*, 43 U. C. R. 313.

See 37 of our Dower Act, R. S. O. ch. 55, provides that either party may, after the expiration of ten days after fying of the sheriff's return, and provided such ten days have elapsed before the first day of the Term next after such fying, and if not then within the first four days of the succeeding Term, apply for and the Court may grant a rule, &c.

Sec. 39 makes the report final and conclusive if the rule be discharged, *or if the report is not moved against within the proper time, &c., &c.*

The report here was fyled 29th May. The Easter Term or sittings being not then concluded, under the old law, application might have been made within the first four days of Trinity Term, commencing on the first Monday after 21st August.

Order 57, rule 480, directs the sittings of the High Court, Michaelmas, Hilary and Easter, omitting any reference to Trinity Sittings.

481 provides for a Vacation Judge "for the hearing in Toronto of all such applications as may require to be immediately or promptly heard."

482: "The Vacation Judges may sit either separately or together as a Divisional Court, as occasion shall require, and may hear and dispose of all actions, matters, and other business, to whichever Division the same may be assigned."

The application to the Court in this case was not made until Thursday 22nd November last, being the 4th day of Michaelmas Sittings.

We do not see how we can distinguish this case on the authorities.

The application could have been made in due time to the Vacation Judges.

As this has been the first case on this Dower statute expressly raising the point, and as if made in time we should have probably set aside the assignment of Dower on the merits, we dismiss the motion, without costs.

ARMOUR and CAMERON, JJ., concurred.

Motion dismissed, without costs

[QUEEN'S BENCH DIVISION.]

KERR V. THE CANADIAN BANK OF COMMERCE.

Assignment for creditors—Validity of—Trust to pay partnership debts only—Power to pay off liens in full—Change of possession.

W. and W. made an assignment of all their assets, both separate and partnership property, to the plaintiff in trust, to realize and pay "all the just debts of the said creditors of the said debtors ratably and proportionably, and without preference or priority." There was a proviso that the trustee might pay any creditor in full whose debt constituted a lien on any part of the assets, whenever he deemed it advisable so to do. It appeared that one of the partners had no property, and owed but \$110: that the other had some household furniture which was seized for rent, which it satisfied: that he owed less than \$100 otherwise; and that all these separate debts had been satisfied.

Held, CAMERON, J., dissenting, that the assignment was not void in providing for payment of partnership creditors only.

Held, also, that the provision that the trustee might pay off any lien or charge on the assets, did not invalidate the assignment.

Held, also, that there was, under the facts stated below, an actual and continued change of possession.

INTERPLEADER, tried at the last Winter Assizes before Rose, J., without a jury.

The question was, whether certain goods seized by the sheriff of the county of York, under an execution at the suit of the defendants against a certain firm of Willing & Williamson, were at the time of the seizure the property of the claimant as against the defendants. It appeared that the plaintiff claimed under an assignment, dated 16th November, 1883, made by the said Willing & Williamson of the first part, the plaintiff, as trustee, of the second part,

and the creditors of the said Willing & Williamson, of the third part, reciting the insolvency of the said Willing & Williamson, and their desire to have their assets disposed of and applied in payment of their liabilities, and then jointly and severally conveying to plaintiff all their and his real estate, and their interest in the leasehold set out in a schedule annexed, as well as all their and his personal estate which they or either of them had, including the assets set out in a certain other schedule, upon trust to collect, realize, or sell in such way as said trustee should think fit, and apply the proceeds in payment of the expenses of the assignment and of the estate, and the balance in payment of all just debts of creditors, ratably, with the right to pay, whenever he should think it advisable in the interests of the trust, any debts constituting by law a lien on any part of the assets, and thereafter to pay any balance to said Willing & Williamson either in money or otherwise as such balance should then be. And it was declared that the assignment was made to said trustee as trustee for said creditors and was irrevocable, and that said creditors agreed and consented to the trusts.

It also appeared that the plaintiff went into possession of the goods in question immediately upon the execution of the assignment and between twelve and one of the o'clock of the day of the 16th day of November, 1883, and was in possession when the sheriff came and seized the goods on the same day under the defendants' execution, which was delivered to the sheriff at 3.57 in the afternoon of the same day. It also appeared that at the time of the making of the assignment Robert Burns Willing had no property apart from the partnership property, except some furniture: that he owed about \$400, \$313 of which was for rent, and the balance in trifling amounts: that his landlady seized the furniture for the said rent and realized the rent by the sale thereof, and that he paid his other debts. It also appeared that at the time of making the assignment William Williamson had no property whatever apart from the partnership property: that he owed about

\$110, portions of it to his shoemaker, tailor, and to one Holland : that he had obtained from these persons a release of the trust property from any claim on their part : that he did not recollect any other debts, but he said he might owe some other small amounts of two or three dollars.

The learned Judge gave the following judgment :

ROSE, J.—As I have come to a conclusion in the case, and seeing that my opinion can be reviewed next week, perhaps it will be better to give my decision without further delay. I cannot distinguish the case, as to possession, from that of *Roblin v. Forbes*, in which a decision was given by Wilson, C. J., at the Belleville Assizes last spring. The judgment is in writing, and will be found with the record. There the assignee went into possession, and did acts very similar to those in this case. He obtained possession of the office, and of the cash box, and, at night, of the keys ; he took possession by locking the door, returning the next morning. The same staff were employed, the business went on as usual. The sheriff came there the next morning. The Chief Justice held there was actual and continued change of possession, the assignee having done all that could be done under the circumstances. I think, in this case, the possession was *bond fide* * *

As to the directions contained in the deed for the payment of debts, I find that the deed is made between Willing & Williamson by name.

[The learned Judge here set out the provisions of the deed as above, and continued :]

The draft deed was, "debts of the said creditors and the said debtors ;" the word *and* in the latter part was stricken out, and the word *of* substituted, leaving the deed in the hands of the assignee to read : "Debts of the said creditors of the said debtors." The literal meaning would be debts of said creditors, although that evidently would not be what was intended. Yet it is argued that I am bound by *Mills v. Kerr*, 7 A. R. 769, to look at the wording of the deed alone. If I take the words literally of course the deed is invalid ; if, on the other hand, I disregard the words, "of the said creditors," and read it as "just debts of the said debtors," another difficulty will arise. Mr. Falconbridge contends I should read the word *of* before "the said creditors" as meaning "due to." The transposition clause would then

ad, "of the debts of the debtors due to said creditors." I do not know that I am at liberty to so read the deed; and in the view I take of it, it is not material that I should further consider it. As I read the deed, disregarding the words "of the said creditors," the direction to the trustee would be to pay the debts of the debtors. That would be one of two things; either the estate is to be administered for the benefit of the firm creditors only, or the whole estate is to be administered without regard to the different classes of creditors. If the estate is to be administered for the benefit of the creditors of the firm alone, the deed would fall within *Mills v. Kerr*; if it makes no distinction between joint and separate estates it would probably be held to come under *Badenach v. Sluter*, 8 A. R. 402. (a) Following these decisions, I think I should hold the deed valid as against the execution creditors.

The next proviso is, "notwithstanding anything hereinafter contained, the said trustee shall have the right to pay in full, whenever he deems it advisable in the interests of the trust, any debts which by law constitute a lien or charge upon any part of the said assets." For a moment disregarding the word *hereinafter*, which seems to be inapplicable, the effect of that clause would be to allow the trustee, whenever he found any debt which constituted any lien upon any portion of the estate, whether that portion of the estate was sufficient to pay the debt or not, to pay the debt in full. For instance, if any one held a lien for a claim of five thousand dollars on a portion of an estate worth only three thousand dollars, this clause would authorize the trustee to pay the debt in full. Mr. Justice Patterson, in *Andrew v. Stuart*, 6 A. R. 19, expressed the opinion that such a deed would be ineffective if it provided that the trustee might pay the execution creditors in full out of the general estate, because in his opinion the book debts, a portion of the general estate, would not be liable to seizure under execution.

It would also strike one that in any case it would be very unfair to allow the general estate to go to discharge the lien debts; and one would think it would be safer, in drawing such deeds either to say nothing about the lien debts or to confine them to the portion of the estate on which they formed a lien. In view of the observations of Mr. Justice Patterson, I would be unable to hold that the

(a) This case has been argued in the Supreme Court, and stands for argument.

se under consideration is one proper to be inserted in the deed. My judgment, therefore, will be in favour of the defendants, and, as far as I have power, with costs; and, in course, the plaintiff has power to move to enter judgment as he may be advised.

On February 14, 1884. Moss, Q. C., moved to set aside the judgment of the learned Judge at the trial and findings of fact upon which such judgment was founded, and for judgment in favour of the plaintiff, or for such further order as might seem just.

J. K. Kerr, Q. C., shewed cause. The assignment is void, because it provides for payment of debts of other than the creditors. Then, the assignment is void in consequence of the discretion given to the assignee to pay the full claims secured by liens: *Andrew v. Stuart*, 6 A. R. 495. Then, payment of all joint and several debts out of the separate and joint assets is provided for without marshalling separately. The assignment vests the property without proper directions: *Mills v. Kerr*, 32 C. P. 72, 7, A. R. 769; and cases cited. This objection is now open. Releases given subsequently cannot relate back so as to validate the assignment. Then, the deed is void, and the execution is entitled to priority, as there was no change of possession from the debtors to the assignee.

Moss, Q. C., and Lees, contra. The assignment can be so read as to support its necessary intention. See *Forsyth v. Galt*, 22 C. P. 115; *Farrell v. Farrell*, 2 U. C. R. 652. Then, the discretion given the trustee was not an absolute and uncontrollable discretion. He was to make such payments only as were "in the interests of the trust," though, no doubt, this was an unfortunate provision. In any case it can be rejected surplusage. *Andrew v. Stuart* did not give the assignee any discretion, and therefore created a preference. See *Burrill* on Assignments, p. 301. Looking at the whole deed, it must be held to apply the joint estate to joint creditors. See *Mills v. Kerr*, 7 A. R. 769. There

the separate creditor objected, but here the joint creditor is objecting. *McDonald v. McCullum*, 11 Gr. 469, shews he cannot be heard. Here partnership creditors get the separate estate. This case was not cited in *Mills v. Kerr*. See *Ontario Bank v. Lamonte*, 3 C. L. T. 548; *O'Brien v. Clarkson*, 2 O. R. 525.

March 8th, 1884. ARMOUR, J.—I think the evidence shewed that there was an immediate delivery and an actual and continued change of possession of the goods in question sufficient to satisfy the requirements of the R. S. O. ch. 119, and this being found the only questions for our determination are, as to the validity of the assignment.

The first objection to it is, that it provides "for the payment of all the just debts of the said creditors of the said debtors," and it is argued that the meaning of these words is, that payment is to be made of all the just debts owed by the creditors of the said debtors. I think, however, that the plain meaning of them is, that payment is to be made of all the just debts owed to the said creditors by the said debtors, these debts being debts of the said creditors in the sense that they are owed to and owned by the said creditors, and being the debts of the said debtors in the sense that they are owed by the said debtors.

The next objection to it is, that by it each partner assigns his own property for the payment of the creditors of the firm without making any provision for the payment of his own creditors, and thereby prefers the creditors of the firm to his own creditors, and it is argued that the effect of this is to render the whole assignment void.

Before discussing this objection it is well that I should state the facts bearing upon this objection accurately, as I understand them.

At the time of the making of this assignment the firm was insolvent; its assets were insufficient to pay its creditors. The partner Williamson had no property apart from that of the firm, and owed his own creditors about \$110. The partner Willing had no property apart from that of

the firm except some furniture, and owed his own creditors about \$400. The defendants were creditors of the firm, and the goods seized under their execution were property which was the property of the firm.

I do not see how under these circumstances this assignment can be held to be wholly void. If it had been of the property of the firm only it would have been clearly good; how then can the fact that it was also of the property of each partner make it wholly void? The assignment of the property of each partner is quite separable from the assignment of the property of the firm, and it does not follow that because the assignment of the property of each partner may be void, this renders the whole assignment void.

I am free to admit that the assignment made as this is, and under the circumstances above stated, by each partner of his own property for the payment of the creditors of the firm, in preference to his own creditors, is void; but it is only void as against his own creditors, and they are the only persons who can avoid it, and it is only void so far, and so far only, as it assigns his own property.

These defendants are not injured by this assignment; on the contrary, they are benefited by it, and they cannot complain if the creditors of either of the partners should have the assignment of his own property made by such partner declared void, as that would only remove from the assignment what the defendants are urging ought never to have been there, and would leave the assignment in other respects wholly unaffected, and it would quite remove the defendants' cause of complaint.

Viewed in another aspect, this assignment is not wholly void. It is not void as to the real estate assigned by it, for real estate is not within the statute; neither is it void as to the book debts, for a like reason.

The only other objection to the assignment is the power given to the trustee to pay in full, whenever he deems advisable in the interests of the trust, any debts which by law constitute a lien or charge upon any part of the said

assets; and it is argued that the conferring of this power upon the trustee avoids the assignment; and it is put upon this ground, that it enables the trustee to prefer some creditor, or, in other words, to commit a fraud. It is not contended that he would not have the power to do precisely what he is empowered to do if there were no such provision in the assignment, but it is said the putting it in the assignment makes the assignment void. It can only make it void if it affords a conclusive presumption that the debtors intended he should prefer some creditor, and I do not think it affords any such presumption, or any presumption at all other than that the trustee will act honestly in the exercise of the power for the interests of the trust.

In my opinion the judgment should be set aside, and judgment entered for the plaintiff, with costs.

I refer to *Doe Thompson v. Pitcher*, 6 Taunt. 359; *Taylor v. Whittemore*, 10 U. C. R. 440; *Burrill on Assignments*, sec. 501; *Morrison v. Atwell*, 9 Bosw. 504; *Fox v. Heath*, 16 Abb. Pr. R. 163; *Scott v. Guthrie*, 25 How. Pr. R. 512; *McDonald v. McCallum*, 11 Gr. 469.

CAMERON, J.—I am of opinion the assignment under which the plaintiff claims is not open to be avoided on any of the objections taken to it, except that which relates to the assignment of the individual assets of the assignors, as well as their joint assets, to satisfy the joint liabilities merely. The case in this respect is not distinguishable from that of *Mills v. Kerr*, 7 A. R. 769, unless the fact that the execution creditors are joint creditors of the assignors makes it so. I am sorry to say I do not think that that circumstance in law makes any difference. The defendants have done no act by which they have estopped themselves from disputing the validity of the assignment. When they obtained their execution they were entitled to enforce it against any effects of the debtor, and the question is not whether the assignment was invalid at the instance of a particular creditor, but whether at the time

the defendants' execution was placed in the sheriff's hands it was void as against creditors generally.

This must be determined by the proper construction to be put upon section 2 of the Act, ch. 118 R. S. O.

This section enacts that in case any person in insolvent circumstances makes any assignment of any of his goods or chattels or effects with intent to give one or more of the creditors of such person a preference over his other creditors, or over any one or more of such creditors, every such assignment shall be null and void *as against the creditors* of such person.

Nothing can be more explicit and general than this. There is no restriction or limitation whatever. The instrument is made absolutely void, and an execution creditor is not debarred from realizing his execution, whether such creditor comes within the class preferred or the class excluded. The transaction is contrary to the declared policy of the law.

The question of intent existing in the mind of the debtor is unimportant. Since the decision in *Mills v. Kerr* they cannot be heard to say, in the face of the legal effect of the assignment, that they did not mean, though nothing was further from their thoughts than, to give preference to one creditor over another, and there being creditors other than those preferred the assignment is void if it had never been made.

If a separate creditor sued or avoided the deed, would not the joint execution creditor be prejudiced and delayed thereby, and being so he is clearly not to be forced to stand by and allow that prejudice to happen to him, unless he has done something to shew he has elected to avail himself of the assignment in preference to his legal remedy.

I regret that I am forced to differ from my learned brothers on this ground; for, dealing with this question as one of fact, I think the assignment was essentially an honest one, that should be upheld if possible.

I entirely agree with the opinion just expressed by my brother Armour upon the other points and grounds of objec-

tion. As a question of fact there was an actual, immediate, and continued change of possession.

The provision permitting the assignee to pay off liens does not give a preference to a lien-holder. It is a permission that the assignee could not properly avail himself of unless it were in the interest of the creditors that the property should be released from the pressure of the lien.

The statute does not render void such an assignment because under its provisions the assignee may possibly misconduct himself, or do that which may be prejudicial to the creditors generally, unless the provision shows an intent on the insolvent's part thereby to give such lien holder a preference. Then, the deed not in terms giving the preference, it becomes a question of fact whether that was its object. If so, it would be void. There is no evidence to support such intent in this case.

I am, on the one ground above stated, of opinion the learned Judge's finding at the trial in favour of the defendants was right, and should stand.

HAGARTY, C. J.—I agree in the result. I do not think the assignment is void on its face, nor that we should assume that there must necessarily be any separate creditors.

It differs widely from *Mills v. Kerr*, in Appeal, 7 A. R. 769.

It is sought to be impeached by a joint creditor, for whose benefit and for that of all other joint creditors the property is assigned.

There is no pretence of any moral fraud or design to defeat or delay creditors, and the objection as to separate estate is of the merest technicality.

When the facts are inquired into it turns out that the trifling separate estate has gone to pay a separate debt, and all separate creditors are satisfied and are non-existent. Unless bound by some express decision I could not agree to defeat an apparently honest arrangement on such an intangible ground; and it would seem to be rather a reproach to our law if the objection prevailed.

It is said we must take the assignment as matters stood at its execution. I think so too, if circumstances shewed that the disposition made was a fraud upon creditors, separate or general.

No fraud or wrongful design was even suggested. The instrument is not void on its face, and it is shewn that its operation cannot possibly work any wrong, or give an undue preference to any creditor.

The decision of the learned Vice-Chancellor Mowat, in *McDonald v. McCallum*, 11 Grant 469, is in point, and appears to be sound in principle.

I agree with the judgment delivered on the other point.

Judgment for plaintiff—

[CHANCERY DIVISION.]

CLARKSON ET AL. V. WHITE ET AL.

cy—Personal earnings of insolvent pending discharge—Maintenance insolvent—Assignee in insolvency—Parties—Amendment—Costs—33 Vic. c. 16—43 Vic. c. 1 (D)—43 Vic. c. 1 (D).

nee in insolvency is entitled to all the earnings of an insolvent which are after the assignment in insolvency, and before discharge, over and above is necessary for the reasonable maintenance of the insolvent and his

e, where an insolvent, pending his discharge, applied part of his earnings to the purchase of land for the benefit of his wife: that to the extent of earnings so applied the assignee was entitled to a lien on the land.

so, that the repeal of the Insolvent Acts by 43 Vic. c. 1 (D), before claim was made, was no bar thereto, the estate of the insolvent having vested in the assignee before April 1st, 1880, and there having been no reconveyance of the property to the insolvent, who had, however, obtained his discharge before the claim was brought.

the original plaintiffs in an action were not entitled to any relief but by amendment, and a party was added to whom relief was granted: that the defendants were entitled to costs of the action up to the date of the amendment.

writ in this action was issued on February 6th, 1882. The original claim was by R. C. Clarkson, plaintiff, against A. White, W. White, and the Freehold Loan and Savings Company, defendants. The statement of claim set out that the defendant W. White formerly carried on business at the Village of Thornbury, in the County of Grey, as a general merchant: that about January 25th, 1882, the said defendant, being insolvent, assigned his estate, both real and personal, to the plaintiff for the general benefit of his creditors, at whose request and as trustee for whom the plaintiff brought this suit: that previous to 1876 the said defendant carried on business at the Village of Aylmer, in the County of Elgin, but failed in the said business: that on February 19th, 1876, one John Mevitt granted and conveyed to the defendant Mary Ann White, the wife of the said W. White, certain premises for the consideration of \$2,750: that only \$400 of the said consideration was paid in cash, and a mortgage was given back to the said defendant for the balance: that all the said \$400 was paid by the said defendant W. White, who continued to make payments

thereon till March 29th, 1879, when the same was finally paid off and discharged: that W. White had made large and valuable improvements on the said lands, which were now of great value: that the said lands were taken in the name of the defendant Mary Ann White with intent to defraud, delay, hinder, and defraud the then and future creditors of W. White, and she took the said conveyance, and had always held the same in trust for her husband; and her said husband was and is the equitable owner of the said lands: that subsequently to the said deed and transfer to the plaintiff, the defendants White purported to convey and grant the said lands to the defendants' company by way of mortgage to secure payment of the sum of \$2,500, but no portion of the said moneys had been advanced. And the plaintiff sought to have the defendant Mary Ann White declared to be a trustee for her said husband of the said lands, and now to be a trustee for him, the plaintiff, of the same to the extent necessary to pay his just debts in full: that the mortgage to the defendants' company might be ordered to be discharged on payment of any costs, charges, and expenses had by them; or if they so elected that the same should stand as a valid security, and the moneys to be advanced thereon be paid to the plaintiff, and that in that case Mary Ann White might be declared a trustee of the equity of redemption in the said lands for the plaintiff.

By amendment, one Davidson, as assignee in insolvency of W. White, was joined as a party plaintiff, and an allegation was added that in February, 1874, the estate of the defendant W. White, as well as the estate of the firm of White & Jagger, of which he was then a member, was placed in insolvency, and the plaintiff Davidson became, and had since been the assignee thereof; and also that the defendant W. White purported to have obtained his discharge in insolvency in 1879 from the liabilities existing at the time of his failure in 1874; but the plaintiff claimed that the said discharge was null and void, and that he did not disclose the lands in question as a part

of his estate at the time such discharge was granted ; and that in any case his interest in the said lands, at the date of his discharge, became and remained the property of his said assignee Davidson.

The rest of the facts of the case, and the arguments adduced, sufficiently appear from the judgment.

The evidence was taken before Boyd, C., at Toronto, on April 21st, 1882, and subsequently the case was argued, also at Toronto, on December 6th, 1882.

C. Moss, Q. C., and *Gibbons*, for the plaintiffs, referred to the Insolvent Act of 1875, 38 Vic. ch. 16, sec. 16, (D.) the equivalent of the Insolvent Act of 1869, 32-33 Vic. ch. 16, sec. 10 (D.); *The Merchants' Bank of Canada v. Clarke*, 18 Gr. 594; *McGee v. Campbell*, 2 C. L. T. 455 (a); *Jackson v. Bowman*, 14 Gr. 156; *Barrack v. McCulloch*, 3 K. & J. 110.

R. E. Kingsford, for the Freehold Loan and Savings' Company, asked to have the mortgage to the company discharged, as no money had been advanced on it, but claimed costs and charges against the co-defendants.

McKelcan, Q. C., for the defendants the Whites, referred to *Lewin on Trusts*, 7th ed., p. 163; *Kingdon v. Bridges*, 2 Vern. 67; *Glaister v. Hewer*, 8 Ves. 199; *Dummer v. Pitcher*, 2 My. & K. 262; *White v. Elliott and Mooney*, 50 U. C. R. 253; *In re Dowling, ex parte Banks*, L. R. 4 Ch. D. 689; *Williams v. Chambers*, 10 Q. B. 337; *In re Russell*, 18 C. L. J. 384 (b); 43 Vic. ch. 1 D.

Charles Moss, Q. C., in reply, referred to *Re McLaren and Chalmers*, 1 App. 68; *Ex parte Haggins, In re Haggins*, L. R. 21 Ch. D. 85.

December 23rd, 1882. BOYD, C.—William White and Mary A. White were married in September, 1873. The husband made an assignment in insolvency as one of the firm of White & Jagger, in February, 1874. He then handed over all his assets to the assignee. There was then in the

(a) Since reported 2 O. R. 130.

(b) Since reported 7 App. 777.

house a piano which he had made a marriage present of to his wife, and household furniture which he gave to her after her marriage. Upon the piano was a lien for the price; it was claimed by the makers and redeemed by a brother of the insolvent, and afterwards acquired by the wife and sold by her for \$390. The creditors did not claim this, as it was supposed not to be worth the trouble to redeem it. There was another brother of White, who had a private debt against him exceeding the value of the furniture. An understanding was arrived at by which the furniture was abandoned by the partnership creditors and the assignee, and turned over to this brother in satisfaction of his claim. The furniture so abandoned subsequently came into the hands of the wife and was sold by her for between \$200 and \$300. The book debts of the partnership were bought by another brother and acquired from him by the wife, out of which she collected, as I judge, about \$300. She had besides \$100 which her father had given her before her marriage.

The land in question was purchased for her in December, 1875, at the price of \$2,700. Ten dollars were paid down by Richard White (a) who was acting for the wife, and the balance of the first instalment, \$390, was paid out of the moneys in the hands of the wife, as was also the next payment of \$600 on May 1st, 1876. She had sufficient means from the proceeds of the piano, furniture, and book debts to pay these instalments, and the evidence satisfies me that these payments were made with her money. The next payment of \$1,000 was due in April, 1877. To meet this \$500 was borrowed from S. White (b), and the balance of \$500 was paid out of the earnings of the husband. The last payment of \$750 was made in two sums in April and December, 1878, and also out of the earnings of the husband. In the last evidence it is said by the wife that \$300 was borrowed from another brother to help in the last payment, but husband and wife agree in the earlier

(a) This was a brother of W. White.

(b) This was another brother of W. White.

evidence that the whole was paid out of his earnings. I find as a fact that \$750 and \$500 of the earnings of the husband went into this land in part payment of the price prior to his discharge in insolvency, which was on June 6th, 1879. The \$500 borrowed from S. White was repaid him by the husband after his discharge in the fall of 1879, from profits made by him out of the sale of some bankrupt stock.

As to this last payment of \$500, the husband had not then entered into a regular line of business—he was dealing in the buying and selling of bankrupt stock as isolated transactions. The earliest creditor now existing since his discharge only goes back as far as November, 1881. No case is made in the pleadings for impeaching this payment as being made to defeat subsequent creditors, or at a time when he could not reasonably make it for the benefit of his wife. The facts do not bring it within the authority of *Jackson v. Bowman*, 14 Gr. 156, and my conclusion is, that it is not impeachable on this record.

But as to the payments made by him pending his discharge, these may be followed as alienations of assets which enure to the benefit of the assignee. The argument against this result is, that the payments were made out of the personal earnings of the insolvent accumulated by the thrift and economic management of the wife. The moneys were unquestionably derived from the husband's personal earnings when he was a clerk in the employment of various merchants named at a salary of from \$600 to \$800 a year. The policy of the Insolvency and Bankruptcy Acts as practically worked out, is to exempt the personal earnings of the undischarged bankrupt from being claimed by the assignee in so far as that claim would interfere with the reasonable and proper maintenance of the insolvent and family according to their station in life. The incentive to labour in order that a man may provide for his own household, is not to be lightly interfered with. "Salary" in truth to borrow from the quaint exposition of the old writers, is but "salt money," (*Skeat's Dict. sub voce*) and so called

"because it is as necessary for a man as salt, and makes his labour relish as salt doth his meat." (*Termes de la ley*. 1667.) But it is not a reasonable conclusion to hold that because of this he may assert the privilege for sums far beyond what is required for the suitable maintenance of himself and his family, to the exclusion of creditors who have claims upon him in this regard at least next to those of his family.

In all cases where the personal earnings have been held exempt, it will be found that it was assumed that the moneys in question were necessary for the present maintenance of the debtor and his family. In *Hesse v. Stevenson*, 3 B. & P. 565, at p. 578, Lord Alvanley said: "Can there be any doubt, that if a bankrupt acquire a large sum of money and lay it out in land, that the assignees may claim it? They indeed cannot take the profits of his daily labour. He must live. But if he accumulate any large sum, it cannot be denied that the assignees are at liberty to demand it."

In *Chippendale v. Tomlinson*, 4 Doug. 318, referred to in *Kitchin v. Bartsch*, 7 East., at p. 57, Mr. Justice Buller said the bankrupt had an undoubted right to sue for the profits of his labour, but supposing a person in his situation should gain a large sum of money or considerable effects, then such money and effects would undoubtedly be liable to his assignees. That case is referred to by Lord Ellenborough in *Kitchin v. Bartsch*, 7 East., at p. 62, as one in which the hardship of the case might perhaps have warranted the opinion of the Judges, when the evil might have been better remedied by statute.

In *Williams v. Chambers*, 10 Q. B. 337, the decision proceeded upon the averment in the plea that the money payable in respect of the personal labour of the insolvent was not more than sufficient for the necessary support of himself and his family. In *Wadling v. Oliphant*, L. R. 1 Q. B. D. 145, though it was unnecessary to decide the precise point, the Judges were evidently of the opinion that the surplus of moneys derived from personal labour, not required for maintenance, are claimable by the assignee. See

the contemporary reports of the same case in 24 W. R. 246, 45 L. J. Q. B. 173, and 33 L. T. 837. Though it may be that the Court will not nicely investigate what amount is required for maintenance, as indicated by the observation of Bacon, C. J., in *In re Dowling*, L. R. 4 Ch. D. at p. 692, yet where by the act of the insolvent the separation is made between what is required for his support and what is in excess of that, there is no hardship and no violation of any principle of law in applying that excess for the benefit of his creditors. Such is the present case—the moneys applied in payment of the lands have been segregated from the proceeds of his earnings required for his necessary living expenses, and have thereby lost the privileged character which might otherwise have attached to them. By the present English Bankruptcy Acts a discretion is given to the Court to fix how much of the bankrupt's earnings or salary is to be made available for the payment of his creditors. See *Ex parte Higgins*, L. R. 21 Ch. D. 85. But this is merely a means of working out what has always been the policy of these acts, that a bankrupt and his family are not to be left in a state of destitution however improvident or reckless he may have been in the conduct of his business.

The principle which I thought during the argument applied to this case is, I find, recognized in a judgment of James, L. J., in *ex parte Vine*, L. R. 8 Ch. D. 366. I quote his language: "The general principle has always been, that, until a bankrupt has obtained his discharge, all his property is divisible among his creditors. But an exception was absolutely necessary, in order that the bankrupt might not be an outlaw, a mere slave to his trustee; he could not be prevented from earning his own living. On that principle the trustee could not sue for moneys due to the bankrupt in respect of his personal labour, and, if the bankrupt could sue for them only for the benefit of his trustee, he would really be without remedy. If he could not sue for damages in respect of a personal wrong, such as the seduction of his daughter, or anything like that, the Courts of the realm would be closed to him for all

practical purposes. I believe that, never in the whole course of the administration of bankruptcy has an order been made such as that which is now asked for, that is, an order intercepting the damages recovered for a personal wrong done to an uncertificated bankrupt. If the bankrupt had accumulated the money and had invested it in some property, that property might be reached by the trustee. But the fact that he could do that does not enable the trustee to intercept the damages before they reach the bankrupt's hands, or to prevent him, if he has got them, from spending them in the maintenance of himself and his family." See also *Deacon's Bankruptcy Law*, 3rd ed. vol. i. p. 745.

It is argued, although no defence is pleaded on this ground, that the assignee has no right now to claim the moneys in question, because the Insolvent Act has been repealed, 43 Vic. ch. 1, sec. 1 (D.), and that no steps were taken before the repeal to lay hold of this property. The proviso of that section enables the assignee to continue and complete all proceedings under the Insolvent Acts, in cases where the insolvent estate has been vested in the assignee before the April 1st, 1880. The effect of the assignment in this case was to vest in the assignee all his property, &c., which he then had or might become entitled to at any time before his discharge: 32-33 Vic. ch. 16, ss. 10 and 29. That covers after-acquired assets, such as these moneys, and there is no need of any further assignment to vest a title thereto in the assignee. The Act does not in terms except personal earnings from passing to the assignee, but in the working out of the Act these are practically exempt to the extent I have already indicated (see Insolvent Act of 1875, 38 Vic. ch. 16, sec. 89. (D.)) In this case the after-acquired property vested in the assignee, and he had and still has the right to wind up the estate by realizing it for the benefit of the creditors, who are yet unpaid. He is merely completing one of the details of the insolvency proceedings, which is not interfered with by the personal discharge of the insolvent, inasmuch as his estate has never been re-assigned to him. In other words, I regard the insolvency

Proceedings in this case as in progress, and pending for the purpose of recovering and realizing all the assets (Insolvent Act of 1869, 32-33 Vic. ch. 16, sec. 42 (D.); Insolvent Act of 1875, 38 Vic. ch. 16, sec. 39 (D.) The repeal of the Acts does not interfere with such steps being taken from time to time as assets are discovered, so long as there has been no reconveyance of his property to the discharged insolvent.

“Proceedings under the Act” is a large term, and referable by the Act itself to everything done thereunder: See secs. 15, 18, 20, 26, 35, 126, 127 of Act of 1869; and similar language is to be found in the Act of 1875.

Where any proceeding has been taken under the Insolvency Act, which is prosecuted so far before the repeal as to result in a vesting of the estate in the official assignee, then he is empowered to do everything by way of continuation and completion to realize and distribute that estate among the creditors. For these reasons I think the objection, even if properly pleaded, should not prevail.

The frame of the action by the assignee for the benefit of creditors under the voluntary assignment of 1882, was improper, and no relief could have been obtained by him. By the amendment the assignee in insolvency was made a party, and only then was there any right to intercept the action of the wife in negotiating a loan with the building society, and the plaintiffs fail in the chief part of their suit as to the farm itself. For these reasons the defendants the Whites should get their costs up to the time of the amendment from the plaintiffs, and all the costs of the Loan Company should be paid by the plaintiffs. Subsequent to the amendment no costs for or against the Whites. Declare a lien on the land for the sums mentioned, viz., \$500 and \$750, and in default of payment within a month let the same be realized by a sale, and in that event costs of sale to the plaintiffs. Declare that the mortgage to the registered Loan Company is discharged. I do not think it is a case for charging interest on the moneys ordered to be paid. Costs to the Whites may be set off against lien.

A. H. F. L.

[CHANCERY DIVISION.]

CHRISTOPHER ET AL. V. NOXON ET AL.

Company—Parol evidence—Written agreement—Estoppel—General meeting—Co-plaintiffs—Action to restrain calls—Directors—Purchase of stock by directors—Fiduciary position of directors—Ratification of allotment of shares—Exclusion of votes—Power of majority—Necessity for calls—Jurisdiction—Unfair discrimination—Notice of business—Parties—R. S. O. ch. 150, secs. 37, 41.

Where certain shareholders of the G. L. Company sought to restrain a call on stock, on the ground that it was being made in contravention of the terms of certain unwritten agreement alleged to have been entered into between all the promoters, when the G. L. Company was formed.

Held, that evidence of such agreement was inadmissible, since it was contradictory of the written agreement entered into by the plaintiffs when subscribing for their shares, viz., to take stock, and pay the calls when duly made.

Where a by-law making a call on stock was confirmed at a general meeting of shareholders, purporting to be the annual meeting, but not held on the proper day for such annual meeting, as prescribed by the by-laws of the company:

Held, that one who, as a director, had seconded a resolution of the directors that the meeting should be held on the day it was held on, was estopped from objecting to the call on this ground, and so, therefore, were all those who were co-plaintiffs with him in an action to restrain the said call.

Held, also, that, under R. S. O. ch. 150, secs. 37, 41, a shareholder, who is in arrear for unpaid calls, is absolutely debarred from voting at a shareholders' meeting, and in any subsequent action by him to restrain a call, the by-law which was ratified at such a meeting, on the ground that his vote was wrongfully excluded, the above objection can be taken advantage of by the company, though that was not the ground assigned at the time for excluding the vote.

Where shareholders have assisted in making, and approved of calls, they cannot afterwards object that the calls were improperly made.

In the absence of agreement, there is clearly no duty or obligation on the part of directors to pledge their own credit for the benefit of the company.

Where certain shares were allotted to one of the directors of a company at par, in consideration of which he offered to supply funds to meet a pressing demand upon the company, and he voted on these shares at a general meeting of the shareholders, and no opposition was at the time made to his so doing.

Held, that the shareholders must be considered to have ratified the transfer, and could not afterwards object to it as improper.

It was alleged that he thus acquired such stock in order to obtain control of the company.

Seemle, that this would not be improper, if no improper means were used by him; but that had he made a profit thereby, the company might perhaps have claimed it.

An allotment of shares to a director, if a questionable act, may be ratified by the company, and for this purpose, as for all other acts within the power of the corporation, the approval of a majority of shareholders is sufficient.

Where a call is made upon all stockholders without discrimination, or partiality, the Court will never interfere to determine whether it was necessary, or not.

Seemle, however, that if calls were made in such a way as to favor one set of stockholders, and impose an unequal burden upon others, an equity might, perhaps, be found for interference.

When on May 31st, 1880, the directors of a company passed a by-law reducing the numbers of the directorate from five to three, and this was confirmed at an adjourned general meeting of shareholders on June 1st, 1880, and a new board of three forthwith appointed, but, it appeared, no notice had been given either before the original, or the adjourned meeting of the intention of making any such change in the directorate.

Held, that the appointment of the new board was not a legal one, and a resolution by them to forfeit stock for non-payment of calls was invalid, and the forfeiture must be restrained.

Held, also, that the company were properly made parties to an action to restrain such forfeiture, the reduction of the directorate to a board of three being its act.

This was a suit brought by A. N. Christopher, W. G. Wood, C. W. Chadwick, and James McCaughey, as plaintiffs, against James Noxon, Thomas Brown, David White, C. F. Bixel, and the Ingersoll Gas Light Company, defendants, for the purpose of restraining a certain call on the stock of the defendants' company, and a certain forfeiture of stock for non-payment of such calls, and also a certain issue of stock to the defendant Noxon.

The facts of the case and the arguments of counsel are fully set out in the judgment.

The hearing of the case was commenced at the sittings of this Court at Hamilton, on October 23rd, 1882, before Proudfoot, J.

On the following day the learned Judge directed the defendants to produce another affidavit on production, and adjourned the hearing to Toronto, where it was resumed on November 24th, 1882, and lasted during the 25th, 27th, 28th, and 29th of that month.

S. H. Blake, Q. C., and *C. A. Brough*, for the plaintiffs, cited 38 Vic. ch. 23, sec. 2: *Cannon v. The Toronto Corn Exchange*, 29 Gr. 213, S. C. 5 App. 268; *Liquidators of the Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189; *Bowes v. City of Toronto*, 11 Moo. P. C. 463; *Heath v. Crealock*, L. R. 10 Ch. 22; *Brice on Ultra Vires*, 2nd ed., p. 619; *Morawetz on Corp. secs. 243 et seq.*, sec. 360; *Regina ex rel. Allemaing v. Zoeger*, 1 P. R. 219; *Harr. Mun. Man.* 4th ed., p. 211; *Stake ex. rel. White v. Ferris*, 42 Conn. 560; R. S. O. ch. 150, sec. 44; ch. 66, sec. 24.

C. Moss, Q. C., for the defendants other than the company, cited *Brice on Ultra Vires*, 2nd ed., p. 39, 861-2; *McMurray v. Northern R. W. Co. et al.*, 22 Gr. 476; *Cass v. Ottawa Agricultural Ins. Co.*, 22 Gr. 512; *Tyson*

v. Mayor of London, L. R. 7 C. P. 18; *Pittsburg and Steubenville R. W. Co., v. Biggar*, 34 Penn. 455; *Burke v. Smith*, 16 Wall. 390; *Whitehall & Plattsburg R. W. Co. v. Myers*, 16 Abb. Pr. Rep. 34; *Kingston Street Railway v. Foster*, 44 U. C. R. 552, R. S. O. ch. 150, secs. 26, 41, 51; *Bailey v. Birkenhead, &c. R. W. Co.*, 12 Beav. 433; *Turquand v. Marshall*, L. R. 4 Ch. 376; *Re British Sugar Refining Co.*, 3 Kay & J. 408; *Boone on Corporations*, sec. 63.

R. M. Wells, for the defendant company, cited *MacDougall v. Gardiner*, L. R. 1 Ch. D. 13; *Gray v. Lewis*, L. R. 8 Ch. 1035; *Clench v. Financial Corporation*, L. R. 5 Eq. 450; *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. 350; *Yetts v. Norfolk R. W. Co.*, 5 Railway Cas. 487; *Re Electric Telegraph Co. of Ireland, Bunn's Case*, 2 DeG. & J. 275; *Re Electric Telegraph Co. of Ireland, Cockney's Case*, 3 DeG. & J. 170; *Brice on Ultra Vires*, 2nd ed., 146.

S. H. Blake, Q.C., in reply, cited 2 *Lindley on Partn.*, 3rd ed., 962-4; *Brice on Ultra Vires*, 2nd ed., 355; *Jackson v. Ludeling*, 5 Am. Corp. Cas. 86; *Parker v. McKenna*, L. R. 10 Ch. 118; *Davidson v. Grange*, 4 Gr. 380; *Cote v. Stulaconu Ins. Co.*, 6 S. C. R. 193.

January 5th, 1883. PROUDFOOT, J.—The plaintiffs are shareholders in the Ingersoll Gas Light Co., and the individual defendants, White, Brown, and Noxon, are the directors of the company, and the company itself is also a defendant; and by their bill the plaintiffs seek to have a call upon the shareholders restrained, and to restrain a threatened forfeiture of shares if the call be not paid, and to restrain the issue of \$5,000 of stock to the defendant Noxon, under the following circumstances:

The Ingersoll Gas Light Co. were incorporated on March 3rd, 1876. Before that there had existed another company named "The Ingersoll Gas Co." The plaintiffs and the defendants, Noxon, Brown, Wood, White, McCaughey, Christopher, and one C. E. Chadwick, were all shareholders in the Ingersoll Gas Co., and arranged, with the assent of

all the corporators, for the sale of the plant, lands, and assets thereof to the defendants Noxon and Brown, for the benefit of all the persons just named, who agreed to unite in forming the new company. These persons were all liable for the debts of the Ingersoll Gas Co. as makers or indorsers on the notes of the company, or in other ways as sureties for the company, and these liabilities were to be assumed by the new company. The terms of the agreement set out in the fifth paragraph of the bill are :

“That these parties should be interested to an equal extent in the company to be formed, and should be subscribers to an equal amount of stock therein, and that no calls should be made on said stock to meet the debts and liabilities of the Ingersoll Gas Co., which they and the Ingersoll Gas Light Co. were to assume, but that the same should be paid out of the earnings and profits of the latter company, and that if money should be required for the debts and purposes of the Ingersoll Gas Co., or of the Ingersoll Gas Light Co., faster than was realized from the profits of the defendant company, then the same should be raised by means of a loan or loans on the security of the property of the company.”

In pursuance of that agreement the new company was incorporated, and the transfer of the property of the old company to the new company was carried out through Brown & Noxon, subject to the debts of the old company, and the promoters subscribed for an equal amount of stock in the new company, and acted and changed their position upon the faith of the agreement.

The stock of the new company consisted of 2,000 shares of \$20 each, and out of it there was allotted :

| | |
|-----------------------|------------|
| To Christopher..... | 200 shares |
| “ Wood | 200 “ |
| “ C. E. Chadwick..... | 200 “ |
| “ Noxon | 200 “ |
| “ Brown..... | 200 “ |
| “ White | 200 “ |
| “ McDonald | 200 “ |
| “ McCaughey | 200 “ |
| | <hr/> |
| | 1,600 |

McDonald's shares were sold to Bixel, and C. E. Chadwick's were duly transferred to the plaintiff C. W. Chad-

ick, who both had full knowledge of the agreement set forth above.

The new company has been in operation since March 3rd, 1876, and by the profits and earnings, after paying all running expenses, the liabilities of the old company have been reduced from about \$12,000 to about \$3,500, and the new company have on hand accounts, moneys, and assets about sufficient to pay the whole, and do not require to make any call upon stock or to make a loan.

The bill then says that the directors, Noxon, Brown, and White, in violation of the agreement, on June 4th, 1880, passed a resolution that shareholders in arrear in respect to a call of ten per cent. on stock under a former by-law were to be notified that unless the call and interest were paid by July 1st, 1880, the shares in arrear should be forfeited.

The by-law referred to was passed on July 16th, 1879, and is called No. 4, to pay part of the debts assumed by the new company, but it is alleged it was repealed by the directors on October 7th, 1879, by by-law No. 5, but if not repealed it is invalid, because never ratified and confirmed by a general meeting of the shareholders of the company, and because, even if so confirmed, it is in violation of the agreement not to make calls.

The bill says the defendants claim that it was ratified at the next annual meeting of the shareholders held on May 20th, 1880.

The regularity of this meeting and its proceedings is questioned on several grounds:

1. Because, not held on the proper day, as by the by-laws then in force the day for the annual meeting was the first Thursday in April.

2. That the directors excluded McCaughey and his stock from voting or being represented at the meeting, because it had been sold by the Sheriff, of which, if true, there was no evidence at the meeting, nor was there any transfer of the stock which stood in the books in McCaughey's name, and he was present and would have voted against confirmation of the by-law, or giving the directors power to make a call.

3. That if sold by the Sheriff the person who represented the stock was present, and was not allowed to vote on it.

4. The directors, on May 19th, on the eve of the meeting of May 20th, assumed to allot to Noxon \$5,000 of the stock of the company, so as to enable him to vote on it as he did at that meeting, which was in violation of the agreement that all the stockholders should have an equal interest, and an equal amount of stock in the company.

5. The allotment of this stock was made without any notice or opportunity given to the plaintiffs to subscribe for it, and the allotment was collusive and not *bond fide* and was made designedly to derogate from the rights of the plaintiffs.

That but for these expedients the resolutions would not have been carried.

The plaintiffs also claim that the resolution of June 4th, 1880, was invalid and illegal, because, prior to May 31st, the number of directors was five, and on that day three of the directors passed a by-law to reduce the number to three, and procured the sanction of a majority of the shareholders by the means aforesaid, and in accordance therewith elected the present directors at an adjourned meeting of shareholders on June 1st; but the plaintiffs say that the directorate could not be reduced in number unless previous notice of motion to make such a change was given, and a two-third vote of the shareholders in favour of it. But no notice was given, nor the requisite majority obtained.

The plaintiffs charge that the defendants are scheming to work a forfeiture of the stock, and to secure the proprietorship and control of the company to themselves, and that the directors, having in this manner secured a preponderance of stock, are able to control the meetings of the company and refuse to allow proceedings to be instituted in the name of the company, and any application for that purpose would be futile.

By their answer the directors deny that there was any

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ent such as alleged in the bill by which the persons therein were to have any special rights or advantage in any new company to be formed, and assert that n & Brown were liable for the debts of the old company to a much larger extent than any other shareholders, acted for themselves and for their own protection in chasing the property of the old company: and that the persons who subscribed for stock in the new company did so in the usual manner, and upon the usual terms and agreements.

... that the operations of the new company have been so conducted as to enable it to pay off the debts of the old company, and to effect a loan, and that the cost of the same has been paid by the new company.

They deny that the operations of the new company have been sufficiently profitable to pay off the debts of the old company without making calls or effecting a loan, and they claim that after making proper allowances for cost of management, salaries, deterioration of plant by time and use, no profits have been realized, and that extensive repairs and renewals of plant will require to be made soon.

They allege that the call of ten per cent. was required by the necessities of the company to pay off pressing liabilities, and to furnish capital for carrying out the repairs and renewals of plant, and that it was duly made in accordance with the by-laws of the company. They deny that the by-law is invalid for any reason: and assert that by law 4 was duly ratified at a meeting of the shareholders duly called, and at which all the shareholders of the company were present: that in the notice calling the meeting one of the objects of the meeting was stated to be the ratification of the by-law 4: that prior to the meeting, McCaughey's stock had been sold by the Sheriff, and he had not then and has not now any interest in the stock: that the allotment of the \$5,000 stock to Noxon was properly and duly made to enable the company to pay off a pressing liability which could not otherwise have been met. They insist on the right of the directors to forfeit the stock of defaulting shareholders. They claim the benefit of the Statute of Frauds and other statutes relating to written promises and agreements; and assert that the defendants

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an agreement on a collateral subject, but on the same subject as the written one, and directly at variance with its terms. The charter was granted and accepted conferring all the usual statutory power on the directors, and it would be a contravention of the charter to give effect to the alleged agreement.

I have then to enquire if the call has been regularly made, and if the necessary steps have been regularly taken to declare a forfeiture in case of non-payment.

By-law 4 was made by the directors on July 16th, 1879 and levied a call of ten per cent. on the subscribed stock. The plaintiff Christopher was a director and present at the meeting, and from the minutes seems to have made no objections. This seems to have been repealed by the by-law passed on October 7th, 1879—No. 5—and this by-law gave power to the directors to levy calls by resolution, but no one of the calls to exceed fifteen per cent, and an interval of a month to elapse between the times of payment of each of such calls, and on non-payment to forfeit the shares by a resolution. Christopher was present and made no opposition to the passage of this by-law. Both of these by-laws were confirmed by the shareholders at the meeting of May 20th, 1880. The effect of this confirmation seems dubious, as No. 5 repealed No. 4, yet both were confirmed. But it seems to have been considered by the parties to have had the effect of reviving by-law 4, which levied the call, if the proceedings at this meeting were regular. Christopher objected to the proceedings, and opposed the confirmation of the by-laws with all his power.

The first objection to the meeting is, that it was not held on the proper day. Whatever may be the effect of that in ordinary circumstances I need not inquire, for I think the plaintiff Christopher is estopped from making the objection, as on April 29th, 1880, he seconded a resolution of the board of directors that the general annual meeting of shareholders be held on May 20th, as notice had been omitted to be given for the proper day in accordance with by-law 5; and if he is barred so must his co-plaintiffs be, who are united with him on this record.

The next objection is, that votes were not allowed to be given on the McCaughey stock. The stock was sold by the Sheriff on May 17th, 1880, though no payment was made by the purchaser till October, and no transfer of it on the books of the company at the date of the meeting. There may be some doubt as to the position of a shareholder and of the purchaser under such circumstances, but it is not necessary to decide it, for the other objection, that McCaughey was in arrear for the call of ten per cent. required to be paid in within a year from the incorporation of the company, as required by the statute (R. S. O. ch. 150, sec. 37) seems to be fatal. By section 41 no shareholder in arrear shall be entitled to vote. The ten per cent. on his stock amounted to \$200, and he had only paid \$66, and although this was not the reason assigned at the meeting for the rejection of the vote, I do not think the defendants are precluded from availing themselves of it to justify their action. There seems to be no provision in the statute requiring an allotment of stock before the making of calls: *Stephens* on Joint-Stock Companies, pp. 241, 2. And the plaintiffs Christopher and Wood were present at a meeting of the stockholders on February 6th, 1877, when a call of five per cent. was made, and on the same day, at a meeting of the directors, a resolution was passed making such call; and they were also present at another meeting of the directors on April 12th, 1877, when another call of five per cent. was made—payments under the previous call to be payments on this. A meeting of the directors was held on May 6th, 1879, when a call of five per cent. payable on June 13th, and another of five per cent. payable on July 13th were made. None of the plaintiffs were present, but on the following day, an adjourned general meeting of stockholders was held at which Christopher and Chadwick were present, when a resolution was passed ratifying and confirming the proceedings of the directors for the past year. The allotment of the stock by by-law was not actually made till March 5th 1880. This was prior to the meeting of May 20th. But I do not think the plaintiffs, or some of them, are in a posi-

tion to say that the original calls were not properly made, as they assisted in making and approved of the calls.

I think the vote on this stock was properly rejected.

But assuming that the vote should have been received, there would have been a tie—an equality of votes on the ratification of by-law 4. Apprehending, it is said, the possibility of this, the directors held a meeting on May 19th, when Noxon offered to supply funds for some pressing liabilities, if \$5,000 stock at par were allotted to him. The directors voted this to him, Christopher dissenting. This is said in the bill to have been obtained for an improper purpose, to get control of the corporation, but in argument it was also complained of as at an undervalue. I do not think this latter ground is open on the pleadings. An allotment of shares to a director, if a questionable act, is not beyond the power of the company to ratify. The defendants deny the alleged motive, saying that the stock was taken for the purpose of raising funds to pay off a pressing liability. The evidence shows that the creditor was pressing for payment. The plaintiffs say the directors could have raised money on their own security to have paid off the debt, and thus kept the liability afloat till liquidated from the earnings. It is shown that the money could not have been raised in the ordinary way by discount on the credit of the company alone, although the credit of the directors was such that they could have got the money by giving their own security. In the absence of agreement it is clear that there was no duty or obligation on the part of the directors to pledge their own credit for the benefit of the company. The plaintiff Christopher, opposed the allotment at the meeting of directors entirely, I understand, on the ground of the agreement to keep the debts floating, and that all should have an equal share, not that the stock was worth more than par, and that Noxon would thus derive a benefit at the expense of the company. And at the meeting of shareholders the motive alleged by him for his vigorous opposition was the violation of the alleged agreement. The plaintiffs have failed to establish

this agreement by proper evidence, but I would not preclude them from showing the transaction invalid on other grounds. They attack it because Noxon held a fiduciary position in relation to the company and the shareholders, and assert that he could not, therefore, purchase the stock. That he occupied such a position is true, and if he had made a profit by the transaction the company might have claimed the benefit of it: *Lindley* on Partn., 4th ed. p. 588. Were it open to the plaintiffs on this record to show that he had made a profit, I do not think it by any means clear that it has been established. The McDonald stock was, indeed, sold at a premium. But it was only after considerable trouble that he found a purchaser. The other evidence of the value of the stock was, I think, all based on statements shewn to the witnesses and prepared by Christopher, and these figures have not been produced. The company might also, probably, have claimed the stock as purchased for them. But in such cases the right of a *cestui que trust* is to hold the trustee to his bargain, unless he can make a better sale, showing that the transaction is not void, but capable of confirmation. Now, the circumstances are in favor of the allegation of the defendant that the stock was not bought for the purpose of controlling the company—though I am not sure it would have been wrong to do so if no improper means were used—but really for the purpose of furnishing money to pay off the debt of the company. If it had been merely to get control, as even if the McCaughey stock had been voted on there would have been a tie, it would have been enough to have taken one share, but instead of that he takes 250 shares, and pays fifteen per cent. on them for the benefit of the company.

But I think the company must be taken to have ratified the transaction: *Lindley* on Partn., 4th ed., p. 266. The stockholders were not numerous, eight in all I think, and the plaintiff Christopher says they were all present or represented at the meeting of May 20th. Four of them were directors, and with the Secretary, also a stockholder, were

present at the directors' meeting of May 19th, when the stock was allotted to Noxon; and all the shareholders must be taken to have known of this allotment, for he voted on it at the meeting on May 20th, and no opposition appears to have been made to it. Even Christopher's vigorous opposition to the proceedings of that meeting was confined to an endeavour to vote on the McCaughey stock. And to ratify a transaction of this kind by a corporate body it is not required that all the shareholders should approve. All acts within the powers of the body are sufficiently effected by a majority. That the will of the majority shall in all cases be taken as the will of the whole is an implied but essential stipulation in all associations of this sort: *Morawetz*, on Corp., sec. 33; *Lindley* on Partn. 4th ed., p. 608. The company itself could not be permitted to question the transaction, much less could the dissatisfied minority.

A great deal of evidence was given to shew that the position of the company was such that its liabilities could have been kept afloat till discharged by its earnings. As usual in such cases it was very contradictory. I have to regret that it was entered upon at all, for it is a matter concerning the internal management of the company that the Court cannot interfere with: *Lindley* on Partn., 4th ed., p. 895. If the calls were made in such a way as to favour one set of stockholders and impose an unequal burden on others, an equity might perhaps be found for interference. But when the call is made upon all without discrimination or partiality the Court would never interfere to determine whether it was necessary or not. Of course, if the agreement not to make calls had been established, the making them by the parties to the agreement might have been restrained. But in the absence of such an agreement it would be interfering with the powers of the stockholders to inquire, at the instance of a dissatisfied member of the company, what the financial condition of the company was, what its assets were, and whether a call should be one per cent. or ten per cent. The action of the directors in

making the call was approved of by the company at the meeting of May 20th, and that was a power the shareholders had, and having exercised it I cannot inquire whether it was a wise or 'prudent measure or not: *Morawetz on Priv. Corp. sec. 381 et seq.*

I now proceed to enquire as to the validity of the proceedings to forfeit the stock if the calls were not paid.

By-law No. 4, (July 16th, 1879) made a call of ten per cent. payable on August 25th, 1879. No provisions was made for forfeiture on non-payment. By-law No. 5 (October 7th, 1879) gave power to the directors by resolution to make calls, and on non-payment to forfeit after fourteen days notice. These by-laws were confirmed at the meeting on May 20th. The number of directors previous to this was five. On May 31st, 1880, the directors passed a by-law reducing the number of directors to three from and after the next election of directors. This by-law was confirmed at an adjourned general meeting on June 1st, 1880, and on the same day White, Brown, and Noxon were elected directors. And on June 4th, the directors passed a resolution that all shareholders in arrears in respect of the call of ten per cent. made on the capital stock under by-law No. 4 be notified that unless payment of that call and interest is made before July 1st, 1880, the shares then in arrears should be forfeited. Notice of this intention to forfeit was sent to the shareholders in arrears.

By the charter three persons were named as directors, and they had, by the charter and under the statutes, power to determine the number of directors, subject to be confirmed by the company. By-law No. 5 fixed the number at five, which was ratified at the meeting of May 20th, 1880. The statute (R. S. O. ch. 150, sec. 27) gives the company power to increase or diminish the number of directors, but no by-law for that purpose is to be valid or acted upon, unless sanctioned by a vote of not less than two-thirds in value of the shareholders present at a general meeting duly called for considering the by-law, nor until

a copy of such by-law has been certified under the seal of the company to the Provincial Secretary, and also has been published in the Ontario Gazette.

The specific objections to this by-law are stated in the bill to be that the reduction could not take place unless a previous notice to make such a change was given, and a two-thirds vote of the shareholders obtained in favour thereof, but no notice was given, and no such vote obtained, but a lesser one. The statute does not require a vote of two-thirds in number, but in value, and if the McCaughey vote was properly excluded and the \$5,000 properly allotted to Noxon, as I think was the case, then a two-thirds vote was obtained.

The other objection is a more serious one. The notice calling the meeting for May 20th, specified the objects of the meeting as being for the election of Directors of the company, and for the confirmation of By-laws 4, 5, & 6, passed by the directors of the company, and for the transaction of any general business of the company—in fact, it was to have the shareholders confirm a by-law fixing the number of directors at five. Not one word was said, not a hint given, that it was intended to reduce the number to three. At the first general meeting of the new company on July 6th, 1877, five directors had been appointed, and the same number had been continued down to the general meeting of May 20th, 1880. If they had not been legally increased to that number, the meeting was called to ratify it. But it is the common case of the plaintiffs, and the defendants, that the five had been duly appointed. The by-law No. 8 recites that it is expedient to define the number of directors and to reduce the number. The defendants cannot be permitted then to allege that the number had not been properly increased to five. No motion therefore to reduce the number could have been made at the meeting on May 20th, and none was made, and the meeting was adjourned till June 1st. On May 31st, the directors passed a by-law reducing the number to three, and this was confirmed at the adjourned meeting on June 1st.

No notice was given of any new business for this meeting. And, I think, it has been held that no proceeding with a view to forfeiture could be entered upon at an adjourned meeting that could not have been entered upon at the meeting that was adjourned : *Cannon v. The Toronto Corn Exchange.*, 27 Gr. 213, S. C. in App. 5 App. 268.

Any proceedings by the three directors elected on June 1st, seem to me to be insufficient to justify forfeiting shares for non-payment of calls. It is trite law that a power to forfeit must be strictly construed : *Morawetz on Priv. Corp.*, sec. 317 ; and a forfeiture that might be validly enforced by a board of five directors cannot be enforced by a board of three who have not been legally substituted for the five.

I think the call was properly enough made, and that the company may perhaps be able to enforce it when the directorate is properly constituted. But the plaintiffs are entitled to a declaration that the directors, the defendants, have no right to proceed to forfeit the said call for non-payment on July 1st, 1880, and to an order restraining these directors from making or declaring such forfeiture.

I think the decree should be without costs, except of the hearing at Hamilton, which the directors must pay. The plaintiff has failed to establish many of the claims made by him, while I have found it necessary to enjoin the proceedings of the directors. The company was properly a party, if on no other ground, because the reduction of the directors improperly made was its act.

A. H. F. L.

[CHANCERY DIVISION.]

COURT V. HOLLAND ET AL.

Matters of account—Evidence—Bank Draft—Presumption—Mortgage to secure running account—Amendment in Master's office—Fraudulent preference—Innocent lender.

J. and R., living at P., had dealings extending over several years with D., who lived at K., and borrowed money from him from time to time. To secure the money borrowed they executed a mortgage to D., purporting to be for \$4,000, but really intended as security for whatever should be due to them from time to time on the loan account. On taking the accounts in the Master's office some years afterwards, and after J. and R. had made an assignment in insolvency, it appeared that shortly after executing this mortgage, and before so much as \$4,000 had been advanced by D., J. and R. drew on D. for \$1,500.

Held that, under these circumstances, the presumption that D. owed J. and R. the \$1,000 drawn for, was rebutted, the draft being the natural mode in which J. and R. would procure an advance on the security of the mortgage to D.

It appeared, also, that during the pendency of these transactions D. gave J. and R. a mortgage, held by him, to collect, and that J. and R. collected what was due on this mortgage, and retained the same.

Held that the money so collected and retained was covered by the mortgage from J. and R. to D.

Where an amendment in a matter of account, as stated in the pleadings, would be allowed before decree, a similar amendment should also be allowed, if asked for, in respect of the accounts filed, after decree, in the Master's office.

If a person borrowed money from an innocent lender, and employs it in preferring a creditor, the lender is not debarred from suing for its repayment; and if he holds security, such as the mortgage from J. and R. to D. in this case, he can charge the money so loaned on such security.

In this case a number of questions came up by way of appeal from the Master's report in respect to several items, disallowed to the defendants by the Master in taking an account of the mutual dealings between themselves and the plaintiff.

The facts sufficiently appear from the judgments, and the footnotes thereto.

The appeal was argued before Proudfoot, J., on January 11th, 1883.

J. Bethune, Q.C., and J. L. Whiting, for the appellants.

J. MacLennan, Q.C., and T. Langton, contra.

January 31st, 1883, PROUDFOOT, J.—J. & R. O'Neil doing business first in Port Hope, and afterwards in Mont-real, had dealings with their relatives, the Misses Doran (a)

(a). Bridget Doran and Mary Doran, who traded in partnership together, under the name of B. Doran & Co.

in Kingston, selling merchandise to them, and borrowing money from them. These transactions were kept entirely distinct. The O'Neils kept the merchandise account in their books, but made no entry of the money borrowed, as they say they did not want their clerks to know that they were borrowing money. The Misses Doran kept no regular books. They made memoranda of the loans in some small books they had.

To secure the money loaned the O'Neils gave first, on May 3rd, 1869, a mortgage for \$4000 and interest, payable in three years to the Misses Doran, and secondly, on February 19th, 1875, another mortgage for \$14,000 and interest payable in five years. It is not now disputed that these mortgages were given, not for the specific sums named in them, but to secure the Dorans whatever might be due to them on the *loan account*. The mortgages were not registered till the 26th and 28th of December 1876, respectively.

The O'Neils became insolvent and made an assignment on January 8th, 1877. The plaintiff is their assignee.

The bill was filed for the redemption of the mortgaged property, and it was referred to the Master to take the usual accounts. (b)

The Master made his report on September 28th, 1882, by which he finds due to the Dorans \$7,859.19 for principal, and for interest \$5,423.62. Total, \$13,282.81.

I take these facts from the statement of counsel on the argument, for neither the pleadings nor the decree have been left with me.

The Dorans appeal from this report because the Master has disallowed several items claimed by them.

The first is a sum of \$1500, claimed to have been loaned to the O'Neils on May 23rd, 1871. Item 4 in account filed.

The Master's judgment is very concise. He says: "Item 4 disallowed. No evidence in support except Bridget Doran's. Money dealings. Draft by O'Neils. Presumption

(b) By decree dated May 14th, 1879. The bill was filed in October, 1878.

Dorans then owed them. Statement February 1877 Omission of this."

The evidence on the subject, given by Bridget Doran, is that "In February, 1871 the O'Neils drew on us for \$1500, at three months. It was an accommodation draft for the O'Neils, and we took it up by our cheque for \$1500 which draft and cheque are now produced by me." And on a subsequent occasion, she says: "Exhibit 4 (cheque and draft) is the voucher for the next loan \$1500, May 23rd, 1871. That was on three months note of J. & R. O'Neil. The transaction appears entered in the book 'A.' I don't remember the correspondence about that, or whether they had written me about the draft or spoken to me about it. They must have done one or the other, but I do not remember the exact facts. There was no arrangement about when they were to pay it, except when the mortgages were given. That draft is what I mean in my entry in the book by a three months' note. It was taking up that draft that the money was lent." The entry in the book is "May 23rd. Lent on three months note J. & R. O'Neil, \$1500."

The draft and cheque produced prove clearly enough that the money was paid.

The plaintiff contends that the draft is evidence of an indebtedness from the Dorans to the O'Neils; and that in a list of bills receivable, prepared by Dwyer, a relative and a clerk of the Dorans, containing items from November 22nd, 1869, down to October 1875, no mention is made of this; and that it does not appear in another paper drawn by Dwyer and sent to the O'Neils, dated February 1st, 1877, containing a list of notes due by the O'Neils and one or two other items.

The Dorans kept no regular books. The notes and cheques, vouchers for liabilities to them, were kept in a box. It does not appear that any statement was made out by them containing a full list of their claims till the accounts were prepared for the Master's Office, and it is in this way no doubt that a number of items were inserted which we

disallowed, and are not here appealed from. Nor does it appear how these papers were prepared, nor for what purpose. They are not conclusive against the claim. They are of course evidence, but capable of explanation, and do not estop the parties from showing the truth. Again this draft would not properly appear in a list of bills *receivable* by the Dorans. It was in the face of it a liability that was discharged.

The question would then seem to be reduced to this, whether the presumption derived from the shape of the draft has been rebutted.

It is not disputed that the O'Neils were borrowing money from the Dorans, nor that the mortgages were given to secure what might from time to time be due on these loans; nor that on May 23rd, 1871, the amount of the mortgage then existing, that for \$4000, had not been advanced. These circumstances are, in my opinion, amply sufficient to rebut the presumption. The draft would be the natural mode in which the borrower living in Port Hope would procure an advance upon the security of the mortgage, from the lenders, living in Kingston. And then there is the positive evidence of Bridget Doran, proving it to be an accommodation draft. And it was stated, and not denied, that the Master, who took her evidence, gave her credit for integrity and honesty.

I think this appeal must be allowed.

2. The second reason of appeal is, that the Master has not allowed the Dorans a sum of \$230, received by the O'Neils on a Friel mortgage for the Dorans, on March 1st, 1876, and not paid over. *Item 19. (c)*

The plaintiff contends, that this money was not paid to

(c). Evidence as to this Friel mortgage was thus given by Bridget Doran :—"The O'Neils held a mortgage against a man name Friel, and for which we paid them \$1237.00. It was left with the O'Neils to collect for us the instalments and interest, as they fell due. They remitted all that was due on the mortgage, except the second to the last of the instalments, which amounted, I think, to \$230, and which they kept. They were to credit us on the Montreal account they had with us, and which credit they neglected to give us."

the O'Neils, and if it were, it was not a loan to be secured by the mortgage.

If the money were received by the O'Neils I have no hesitation in saying that it would be covered by the mortgage; although it was money received from a debtor to the Dorans, when allowed to be retained by the O'Neils it became practically a loan to them.

The Master's judgment on this item is as concise as on the former: "Item 19, disallowed. No evidence that O'Neils said Walsh got it: only belief sent to Montreal."

It seems that when the O'Neils left Port Hope for Montreal, they sold out their business to Walsh, their brother-in-law, and left him to collect the amount due on this mortgage. It is shown from Walsh's books that he did receive it. R. O'Neil says in his evidence: "I believe that was paid to Walsh, and he sent it to us. I suppose it was remitted by a bank draft, that is the idea in my mind of the money being paid to Walsh and reported to us. He sent us the money. I could not swear to it as a fact. It was paid to Walsh for us. I believe we got the benefit of it."

Bridget Doran says the mortgage was left with O'Neil to collect, and they paid over all except this \$230.

Dwyer says the O'Neils told him soon after the money became due that they had received it from Walsh.

In Walsh's books there is no evidence of the payment of this specific sum to the O'Neils. But I think there are entries that warrant the O'Neils' statement that they got the benefit of it. The money was received by Walsh on March 13th, 1876, and on the 14th he paid the O'Neils \$340, and there are several other payments during the month to them. I should suppose from the Master's judgment, that he thought the only evidence was, what was said by Dwyer of his having been told by the O'Neils, and the O'Neils' belief, and that it was sent to Montreal. There is something additional in Walsh's book, and enough it seems to me to warrant the conclusion that the O'Neils "got the benefit of it." But even if they did not, I think it suffi-

ently plain that he received it as their agent, and they must be accountable for it.

I allow this appeal.

3. The next ground of appeal is, that the Master did not allow the Dorans a sum of \$1,434.06, stated in their account filed, as a balance due B. Doran & Co., on their merchandise account with the O'Neils at Montreal, being item 27 in account.

They ask to be allowed to amend the description of this item, by stating it to be a balance due B. Doran & Co., for a loan of \$1,200, made by them to J. & R. O'Neil, on March 17th, 1876, after deducting payment made on account, and the contra account of the O'Neils, in goods sold by them to B. Doran & Co.

The Master's judgment is: "Item 27 disallowed. Bridget Doran says no agreement that mortgages should cover merchandize account. In fact kept separate. Mortgages not being registered. Loose dealing. Quære if being void under Insolvent Act, not gone into here. Stamps insufficient. Claim on mortgages not on notes. No compound interest."

If the account filed is not allowed to be amended, this judgment is quite accurate, for the mortgages were only security for the loan account. •

But I think it a case in which the amendment should be allowed. All the evidence appears to have been given that is in existence in relation to this item, and I do not think the Dorans should be estopped from putting their claim in this shape, if they are able to establish it. Such an amendment would certainly have been permitted in the pleadings before decree, and I see no reason why the same rule should not apply to the proceedings in the Master's Office. No suggestion is made that the plaintiff will be prejudiced by the amendment being made now, in place of having the claim presented in this shape when the account was filed.

The circumstances connected with this transaction appear to be these:—In March, 1876, the O'Neils wanted

exchange for £1200 sterling, and sent to the Dorans two notes for \$3,000 each, to get discounted and purchase the exchange with. The Dorans found they could not get these notes discounted at the bank on account of O'Neils', name being on them. They then purchased the exchange with their own funds, from Gwinn & Co., and sent it to the O'Neils. In this shape it was clearly a loan account and not a merchandize matter. And in an account rendered by the O'Neils of their merchandise transactions with the Dorans to July, 1876, this sum is not mentioned. The Dorans did not return the notes. After the insolvency and on January 29th, 1877, an account was prepared of the Doran transactions, whether by the O'Neils or by the assignee does not appear, in which this exchange is carried to the credit of the Dorans, and what they were owing deducted from it. The Dorans are willing to claim only the balance on the loan account.

In that account, the Dorans are credited, as on December 30th, 1876, with a transfer of the Dwyer account \$991.56. The O'Neils were owing Dwyer this sum for salary, and the Dorans paid it to him, or assumed it with his consent. In that shape it would be a loan and covered by the mortgages. But it is objected that it was a fraudulent preference, being within thirty days before insolvency. This was not gone into before the Master. If it were a fraudulent preference, the remedy would be to recover it from Dwyer. I have not been able to find any case where a person borrows money and employs it in preferring a creditor, that the lender has been prevented from suing for it. If he has no security he will only be in the position of a creditor proving on the estate; if he has security I see no reason why he should not be entitled to charge it on the security. There is no evidence that the lender meant to assist in making a fraudulent preference.

But it was by no means proved that this transaction was within thirty days of the insolvency. It is carried into the account of the insolvent or the assignee within that time, but the lenders are not bound by that entry. The evidence

of Bridget Doran is rather indefinite. She says she does not remember at what time in 1876 she made the arrangement about Dwyer's salary being credited to her. "I must have seen the O'Neils before December, 1876. and made the arrangement with them." There is no evidence placing it at a later period, except the entry in the account, and by that I do not think the Dorans bound.

I think this appeal must also be allowed.

4. The fourth ground of appeal I dismissed at the hearing.

The Dorans are entitled to the costs of the first and second appeals, the third is allowed without costs, and the plaintiff is entitled to the costs of the fourth.

There was a cross appeal by the plaintiff, which was abandoned. Defendants to have costs.

A. H. F. L.

[CHANCERY DIVISION.]

TIDEY V. CRAIB.

Chattel mortgage—Notice of unrenewed mortgage—Bona fides—Fraudulent preference—Actual advance—R. S. O. ch. 118 and ch. 119.

Where two mortgagees, the defendants in this action, took a chattel mortgage to themselves, to secure certain moneys, having at the time knowledge of a pre-existing debt from the mortgagor to T., and of a prior, but unrenewed chattel mortgage to T. to secure the same :

Held, that such conduct did not amount to *mala fides*, and T.'s unrenewed mortgage was void as against them under R. S. O. ch. 119.

Held, also, that inasmuch as the mortgagor was coerced into making the second mortgage, it could not be regarded as a fraudulent preference.

Held, further, that the fact that as to part of the consideration for their mortgage the defendants had not made an actual advance, but were merely liable on promissory notes, did not invalidate the mortgage, R. S. O. ch. 119 not requiring as does the corresponding English Act, that the consideration should be truly expressed.

It is sufficient if one of several mortgagees makes the affidavit required by R. S. O. ch. 119, sec. 2.

THIS was an action brought by one Claudius Tidey who sued on behalf of himself and all others the creditors of the defendant Peter Craib, the younger, against Peter Craib, the elder, Peter Craib, the younger, and John Craib, seeking an order against Peter Craib, the younger, for payment to him of a sum of \$750, and interest, and costs of suit, to have certain chattel mortgages declared fraudulent and void, and for other relief as mentioned in the judgment.

The facts of the case and the evidence adduced are fully set out in the judgment.

The case was heard at the Chancery Sitzings of this Court at Woodstock, on May 30th and 31st, 1882, before Ferguson, J.

F. R. Ball, Q.C., and *W. Cassels*, for the plaintiff. There is no doubt the mortgage to the plaintiff continues good as between the parties to it; it is only a subsequent mortgagee in good faith, who takes his mortgage after the expiration of one year, that is protected by the Statute (R. S. O. ch. 119): *Hodgins v. Johnston*, 5 App. 449;

McMartin v. McDougall, 10 U. C. R. 399. How can the subsequent mortgagees in this case be considered mortgagees in good faith, when they knew a direct fraud was being perpetrated upon the first mortgagee? The plaintiff's claim was known to all the defendants from the beginning. Again, the mortgage of September 19th, 1879, should have complied with the provisions of R. S. O. ch. 119, sec. 6, which it does not. As to the mortgage of September 3rd, 1880, Peter Craib, the elder, had paid nothing. He was only a surety. We refer to *Barron on Chattel Mortgages*, p. 135; *Severn v. Clarke*, 30 C. P. 363; *Barker v. Leeson*, 1 O. R. 114; *Brayley v. Ellis*, 1 O. R. 119; *Hamilton v. Harrison*, 46 U. C. R. 127; *Ex parte Charing Cross Advance and Deposit Bank*, L. R. 16 Ch. D. 35; *Hamilton v. Chrane*, L. R. 7 Q. B. D. 319; *Ontario Bank v. Wilcox*, 43 U. C. R. 460; *Kough v. Price*, 27 C. P. 309; *Kalus v. Hergert*, 1 App. 76; R. S. O. ch. 118, sec. 2.

C. Moss, Q. C., and *Nesbitt*, for the defendants. The fact that the goods had been sold to a *bond fide* purchaser for value makes a material difference. The sale was with the concurrence of the mortgagor. It is the same as payment by the mortgagor, and the case is one of preferential payment, if there was a preference, but preferential payment cannot be questioned. R. S. O. ch. 119, does not deal with cases like this at all. Even if the whole of the consideration had not been actually advanced, yet the debt was *bond fide*, and the mortgages now questioned were good between the parties, and that is enough, and no want of formality can make any difference. See *McFee v. Hunter*, 2 C. L. T. 89. *Hodgins v. Johnston*, 5 App. 449, has no application. There the dealing was while the mortgage was in force, here it was after the plaintiff's mortgage had expired. *Barker v. Leeson*, 1 O. R. 114, shews that the plaintiff could not make a sale of the goods as against the other creditors. The mortgage of September 30th, 1880, cannot be regarded as a renewal of that of September 19th, 1879; it is an independent mortgage. Assuming that the defendants Peter Craib, the elder, and John Craib were

February 5th, 1883. FERGUSON, J.—In May, 1877, the plaintiff sold to the defendant, Peter Craib, the younger, and one Jaffrey, who were intending to go into partnership in the publication of a newspaper in the village of Norwich, a printing press and other chattel property known, as was said by printers, by the name "plant," as well as the stock in trade of the plaintiff, at the price of \$1,500. Of this sum three hundred and fifty dollars were to be paid down, and there was to be a chattel mortgage on the property securing the balance. Owing however to the two purchasers being under age, the transaction was made with a brother of Jaffrey, who executed the mortgage to the plaintiff, and the defendant Peter Craib, the younger, and Jaffrey took possession of the property, and, after they became of age they executed in favour of the plaintiff a chattel mortgage upon the property for \$950, to which amount the purchase money had been reduced by payments. This mortgage bore date the 13th of April, 1878, and the money was payable by instalments, the last of which fell due on May 8th, 1880. Default was made in respect of these payments; and on May 8th, 1879, the defendant Peter Craib, the younger, and Jaffrey made a new mortgage to the plaintiff for the sum of \$750, that being the amount then unpaid. This mortgage was upon the same property, and the money was also payable by instalments, the last of which fell due on May 8th, 1880. The mortgages were duly registered. The defendant Peter Craib, the elder, is the father of Peter Craib, the younger, and was aware of the transactions that were being made by his son.

Prior to the 19th of September, 1879, Jaffrey sold his interest in the property to the defendant, Peter Craib, the younger; and on that day Peter Craib, the younger, executed a mortgage upon the property in favour of the defendant Peter Craib, the elder, for \$1,000, payable eleven months thereafter. The plaintiff alleged that this mortgage was without consideration, but the evidence shows that the consideration was \$300, which Peter Craib,

the elder, had become liable to pay for Peter Craib, the younger, at the time of the original purchase, and the sum of \$700, a part of which John Craib, another son, had paid for his brother Peter Craib, the younger, and a part, the larger part, of which he had become liable to pay for him. The \$300 was to enable Peter Craib, the younger, to make the purchase in the first place, and the \$700 to enable him to purchase the interest of Jaffrey.

The plaintiff omitted to renew his mortgage of the 8th of May, 1879, in due time; and on September 3rd, 1880, the defendant Peter Craib, the younger, executed another mortgage upon the property to the defendant Peter Craib, the elder, and John Craib, for \$1,500, payable at the expiration of one year from that date. Default having been made, the property was advertised for sale, and sold under this mortgage on September 6th, 1881, by the defendants Peter Craib, the elder, and John Craib, for the sum of \$1,250.

A mortgage on the property was made on the 12th of August, 1880, to the plaintiff for the \$750. This was not registered, and was afterwards torn with the intention of destroying it; the alleged reason for this act being that the plaintiff had been deceived by the defendant Peter Craib, the elder, telling him that his mortgage was on its face subject to the plaintiff's mortgage, which the plaintiff discovered by search not to be the fact.

This suit is brought by the plaintiff on behalf of himself and all the other creditors of the defendant Peter Craib, the younger, charging fraud and fraudulent preference, contrary to the statute, etc.

The plaintiff seeks to recover a judgment against the defendant Peter Craib, the younger, for the \$750, and asks that the mortgage from Peter Craib, the younger, to the defendant Peter Craib, the elder, for the \$1,000, and that from Peter, the younger, to Peter, the elder, and John Craib for the \$1,500, may be declared fraudulent and void: that he, the plaintiff, may be declared to have a lien on the goods for his unpaid purchase money: that it may be de—

clared that the sale of the goods by the defendants Peter, the elder, and John Craib, was fraudulent and void ; and that these defendants and each of them may be ordered to pay the plaintiff the value of the property, or so much thereof as may be found due ; and for general relief.

It is also alleged that the mortgage for \$1,500 was without consideration ; that there was no debt owing from Peter Craib, the younger, to the mortgagees therein or either of them ; and that it was executed for the purpose of protecting the goods from the creditors of the mortgagor, and in fraud of the plaintiff, of whose mortgage and debt, these mortgagees had full notice and knowledge.

This mortgage was, however, not without consideration, A large part of the \$1,500 mentioned as the consideration had in fact been paid by John Craib for Peter Craib, the younger, before the execution of the mortgage, by his (John's) making payment of the notes that were given to Jaffrey. Other large sums for which Peter, the younger, was in default to a railway company, and several sums of money for other purposes were also paid. As nearly as I can ascertain from the evidence about \$1,100 had been paid in this way.

This money and the \$300 for which Peter Craib, the elder, had become liable in the first place on a joint note for his son, and the sum of \$113 for which John was liable for Peter, the younger, at the date of the mortgage, and which he afterwards paid, make up the \$1,500, and, I think, a few dollars more. The \$300 was subsequently paid by Peter Craib, the elder, and there can, I think, be no doubt that this mortgage was a real transaction made to secure this amount upon the property ; and I am of the opinion that it was a mortgage made in *good faith*. I do not think that the circumstance that the mortgagees were aware of the existence of the debt to the plaintiff, and nevertheless took care of their own interests instead of protecting his, however ungenerous it was so to do, is a good and sufficient reason for saying that the mortgage was not made in good faith.

The plaintiff was a creditor no doubt of Peter Craib the younger, for the sum of \$750. He had a mortgage on the property for this sum. He neglected to renew this mortgage, as required by the statute. The mortgage nevertheless remained good as between the parties to it, but, by the statute it was void as against creditors whenever their claims arose, and as against persons who subsequently became purchasers or mortgagees in good faith: *Hodgins v. Johnston*, 5 App. at p. 452. And apart from certain alleged defects in the mortgage itself, which will be referred to hereafter, I am of the opinion that the defendants Peter Craib, the elder, and John Craib were such subsequent mortgagees in good faith. It was argued that the making of this mortgage was a fraudulent preference, that it was made with the intent to prefer the mortgagees. The plaintiff however gave evidence himself going to show that it was not voluntarily made by Peter Craib, the elder, the mortgagor. This evidence went to show that the mortgagor was coerced into making this mortgage by his father and his brother John, the mortgagees.

It was objected that the affidavit of the debt required by the statute was made by John only, and was under the circumstances not sufficient, and that the plaintiff, being a creditor, was in a position to sustain an objection of this sort; but so far as I can see the cases *McLeod v. Fortune*, 19 U. C. R. 100, and *Severn v. Clarke*, 30 C. P. 363, dispose of this objection in the defendant's favour.

It was also objected on argument that the whole amount of the consideration was not in the form of an existing debt at the time of the execution of this mortgage. It is quite true that the \$300 had not been paid by Peter Craib, the elder, and the \$113 had not been paid by John Craib, but each was liable on a note or notes for the respective sums; and John was liable for a further sum on another note, but afterwards escaped by the neglect of the holder of it.

In the case of *Walker v. Niles*, 18 Grant 210, the mortgage was for \$1,070. It afterwards appeared that the

amount was partly made up of a promissory note made and given by the mortgagee to the mortgagor at the time of the execution of the mortgage, and not paid for some months afterwards; and it was held that in the absence of fraud the mortgage was valid.

In the case *Hamilton v. Harrison*, 46 U. C. R. 127, the consideration in the mortgage was stated at \$1,148, but it appeared in the evidence that the amount actually owing was only \$1,030.80; and it was held that the erroneous statement of the consideration did not avoid the mortgage as a matter of law, but was a circumstance for the jury to consider when deciding the issue of *fraud* or no *fraud*. Being of the opinion, as I have already said, that the mortgage in question was made in good faith, and that the sums of \$300 and \$113 were not fraudulently included in the consideration, I think the fact of their being so included does not render the mortgage void. It must be borne in mind that our Act is different from the English Act in respect to the requirement that the consideration should be truly expressed, and that the cases in England on this subject do not apply.

The conclusion at which I have arrived is, that the mortgage for the \$1,500 in favour of Peter Craib, the elder, and John Craib was good as against the plaintiff, and that as to them he cannot succeed in this suit. The plaintiff is entitled to judgment against Peter Craib, the younger, for the \$750 with interest thereon, and proper costs of suit, and this judgment he may have.

The action must be dismissed as against the defendants Peter Craib, the elder, and John Craib. The plaintiff charged fraud against these defendants, which as I have said he has not, in my opinion, proved; and according to the ordinary rule he would be ordered to pay costs. The case I consider, however, a peculiar one. There is the undoubtedly honest claim of the plaintiff, and the probability that it will not be paid; the relationship of the parties defendants, and the apparently suspicious circumstances surrounding their dealings amongst themselves,

such dealings being against the plaintiff's interests. Their treatment of the plaintiff was the opposite of generous; and all things considered, I think the dismissal should be without costs.

A. H. F. L.



[CHANCERY DIVISION.]

FLANDERS v. D'EVELYN.

Infants—Foreign guardian—Payment of money to.

Where are brought action against an executor in this country to recover legacies bequeathed to infants, resident in Minnesota, of whom he had been appointed guardian by a Probate Court of Minnesota, and it appeared that the duties and powers of guardians under the law of Minnesota were not greater than those of testamentary guardians, or guardians appointed by a Surrogate Court in this country:

Held, that the money must be paid into Court, and not to the foreign guardian. *Seem*, that the rule might be modified if the sum were small, and the whole, or nearly the whole, were required for the infant's education and maintenance, or other immediate use.

THIS action was brought by Joseph Flanders, plaintiff, against Robert D'Evelyn, executor of the last will and testament of John D'Evelyn, deceased, defendant. The plaintiff's claim was against the said defendant for the sum of \$300, and interest, for legacies left by the said John D'Evelyn, deceased, to Edith A. R. D'Evelyn, Dudley W. A. G. D'Evelyn, and Reginald B. G. D'Evelyn, of whom the plaintiff alleged himself to be the duly appointed guardian.

By his statement of defence, the defendant set out the will of John D'Evelyn, by which he devised to his son Robert, the defendant, absolutely all his personal and real estate charged with the payment of \$100 to each of the three children of his late son John, who were the three legatees mentioned in the statement of claim. And the defendant stated that these three legatees all resided, as he was informed, in Minnesota, U. S. A., and were all minors; that he had always been ready to pay the said legacies to

any person properly authorized to receive the same, on his procuring the lands devised to him to be released from the charge of such legacies, and that he was now willing, and offered to pay into Court or as the Court should direct such legacies, provided the said lands were so released ; and he charged that the plaintiff had not been appointed guardian of the said infants by their father, or any competent Court having jurisdiction in Ontario, and that the plaintiff had given no security to any such Court binding him to account for the proper application of such legacies ; that the plaintiff resided in Minnesota, and claimed to be guardian of the said infants by virtue only of his appointment as such by a Court having no jurisdiction in Ontario ; and he prayed such proceedings might be taken as might be deemed necessary to insure the proper payment of the legacies in question to the proper persons, and that the lands might then be released therefrom.

The matter came up on motion for judgment before Proudfoot, J., on January 31st, 1883.

A certified copy of letters of guardianship of the Probate Court of Watonwan County, Minnesota, were put in, which, after reciting that the plaintiff had duly put in a bond conditioned for the faithful performance of his duties as such guardian, constituted him guardian of the said three minors, " with full power to demand, sue for, and take possession of all money and estate belonging to said minors."

The plaintiff by his affidavit deposed that by virtue of the said letters of guardianship he was legally entitled under the laws of Minnesota to the custody and possession of all the estate real and personal of the said minors, and was answerable to the said Probate Court for the management, and safe keeping of the said estates, having given good and sufficient security ; and that the said minors were the children of his wife by her first husband, and were living with him and his wife, in Madelia, in the said Watonwan County of Minnesota.

The opinion of F. L. James, counsellor at law, was also produced, and was as follows :

“Under the laws of the State of Minnesota a guardian minors is entitled to the custody, control, and management of all the property, both real and personal of his wards, subject, however, to the direction of the Probate Judges of the Probate Court having the jurisdiction of the matter. See p. 617, Statutes of 1878, *Young's Compilation*, under sec. 27, where it defines the obligations, and prescribes the duties of guardianship, which says, (1) guardian is to make a true inventory of all the estate real and personal of his ward, and to return the same to the Probate Court at such times as the Judges shall order: (2) To dispose of and manage such estate according to law, and for the best interest of the ward: (3) At the expiration of his trust to settle his account with the Judges of Probate, or with the ward if he be of full age, or his legal representatives, &c. Under sec. 29 *ib.* “He shall also settle all accounts of the ward, and demand, sue for, and receive all debts due to the ward, and give a discharge therefor, and he shall appear for and represent his ward in all legal proceedings.” A Judge of Probate under our statutes has the right to order the funds to be invested.”

H. D. Gamble, for the plaintiff, cited *Simpson on Infants*, p. 233; *Re Brown's Trust*, 12 L. T. N. S. 488; *Shaver v. Gray*, 18 Gr. 419; *In re Crichton's Trust*, 24 L. T. O. S. 267; *In re Ferguson's Trusts*, 22 W. R. 762.

W. N. Miller, for the defendant, cited *Re Charteris*, 25 Gr. 376; *Mitchell v. Richey*, 13 Gr. 445; *Kingsmill v. Miller*, 15 Gr. 71; *In re Baker's Trusts*, L. R. 13 Eq. 168.

February 20th, 1883. PROUDFOOT, J.—The action is for the recovery of legacies to three children, who are infants. The infants reside with their mother and step-father in Minnesota, one of the United States. The plaintiff, the step-father, has been appointed their guardian by the Probate Court for the county of Watonwan, Minnesota, and has given a bond for the faithful performance of his duty as guardian.

The opinion of Mr. James, a counsellor-at-law, is produced, in which he quotes the law of Minnesota defining the duties of guardians, and empowering them to dispose of and manage the real and personal estate of the ward according to law, and for the best interests of the ward; and at the expiration of his trust to settle his accounts, &c.; and entitling him to sue for and receive all debts due to the ward and give a discharge for them.

This action is not brought for maintenance, nor does it appear that any maintenance is required.

The duties and powers of guardians under the statutes of Minnesota do not seem to be greater than those of testamentary guardians under the statute 12 Ch. II., c. 24, sec. 9; or of guardians appointed by a Surrogate Court, who are to have the care and management of the ward's estate real and personal.

But it was decided in *Blake v. Blake*, 2 Sch. & Lef. 26, that a testamentary guardian must pay infant's money into Court, although the testator had committed the estate to his management, and there was no imputation of insolvency or misconduct on his part.

And in *Mitchell v. Richey*, 13 Gr. 445, it was held that a guardian appointed by the Surrogate Court under our statute, although a gentleman of the highest character, was not entitled as of right to the custody of the infant's money.

This rule may be subject to modification, if the sum is small, and the whole or nearly the whole may be required for the infant's education and maintenance or other immediate use. Here the sum is small—amounting in all to \$300,—but it is not sought for as being necessary for any of these purposes, and I cannot therefore order it to be paid to the guardian.

The defendant will be ordered to pay the money into Court, with interest from a year after testator's death. The defendant is the universal devisee and legatee of the testator, subject to the payment of the legacies in question and another, and with the payment of testator's general

expenses, and of a tablet over his grave. He does not suggest that the estate is insufficient for payment of the legacies. He would, if not beneficially entitled, have a right to his costs from the residue, but as he is himself owner of the residue he will make the payment, and no direction will be given as to his costs.

The plaintiff fails in the object of the action and is not entitled to costs; but he ought not to pay the defendant's costs, who might have relieved himself of the trust by paying the money into Court.

A. H. F. L.

[CHANCERY DIVISION.]

TOOMEY V. TRACEY.

Will—Construction—Mixed fund for payment of legacies—Interest on legacies—Charitable bequests—Mortmain.

A testator, after directing payment of his debts out of his personal property, or if that should prove insufficient, then, that so much of his real estate as would supply the deficiency might be sold for that purpose, went on to direct that his land should be sold, and the income of the capital arising from the sale be paid yearly to his wife, for her maintenance during her natural life, after which he gave a number of charitable bequests and pecuniary legacies, but made no residuary gift:

Held that the testator had created a mixed fund to answer the purposes of his will, and if the personalty was not sufficient for the payment of the debts, the legacies were payable out of the land; if it was sufficient, they were payable out of the mixed fund; but so far as the charitable bequests were payable out of the land they were void.

Held, also, that interest was payable on the legacies from a year after the testator's death, in accordance with the general rule, in any event; and this, although, as the whole interest of the proceeds of the land was given to the wife for life, the capital had to be kept invested by the executors, and, consequently, there was no fund for the payment of legacies until her death.

THIS was a special case stated for the opinion of the Court, pursuant to R. S. O. ch. 40, respecting certain questions relating to the proper construction of the will of one Denis Toomey, deceased, by persons interested.

The provisions of the will are sufficiently set out in the judgment.

The case was argued on May 30th, 1883, before Proud-
 ot, J.

J. J. Foy, for the plaintiffs (a). The legacies, other than charitable, are charged on the real estate. *Prima facie* no doubt legacies are payable out of the personalty, but here, by necessary implication, they were to be paid out of the land directed to be sold. The testator assumes that the personalty would not be enough to pay the debts, and then directs a sale of the lands, after which follow the legacies. I refer to *Jarman* on Wills, 4th ed., vol. 2, p. 840; *Elmsley v. Mudden*, 19 Gr. 386; *In re Gilchrist, Bohn v. Ryfe*, 23 Gr. 524; *Singleton v. Tomlinson*, L. R. 3 App. Cas. 404. Then as to interest, though the testator's widow was to get the income for the land sold during her life, the legatees are also entitled to interest: *Theobald* on Wills, 2nd ed., p. 137-8; *Freeman v. Simpson*, 6 Sim. 75; *Lord v. Lord*, L. R. 2 Ch. 784, n. (2).

C. C. McCaul, for the executors. We are ready to pay as directed by the Court, but the costs of the special case should be paid out of the real estate only; it is that that is in dispute. We refer to *Theobald* on Wills, 2nd ed., p. 525; *Patching v. Barnett*, 71 L. T. (Eng.) p. 154 (July 2nd, 1881); *Downman v. Rust*, 6 Rand. (Virg.) 586.

Fitzgerald, for the heirs. No portion of the legacies is payable out of the land. A conversion is only a conversion so far as the property converted is disposed of; and the heirs here are not to be excluded: *Jarman* on Wills, 5th Am. ed., vol. 2, p. 211; *Snell's Equity*, 6th ed., p. 186. Here there is no direction that the legacies are to be paid out of the real estate; neither is there a devise of the land to the executors, nor a devise over: *Jarman* on Wills, 5th Am. ed., vol. 3, p. 427. The charitable legacies are void so far as the land is concerned. The testator must be taken to have known the law, and to have intended these charitable legacies to come out of the per-

(a) The plaintiffs were some of the legatees under the will.

sonalty, and therefore he must have intended the other legacies also to come out of the personalty. But at any rate no interest can be allowed. Interest is only payable on legacies when they become due, and here they could not be paid until the death of the testator's widow. *Taylor's Equity Jurisprudence*, sec. 443; *Lord v. Lord*, L. R. 2 Ch. 782.

Foy, in reply. The land is expressly directed to be sold, and under R. S. O. ch. 107, sec. 22, the executors are the people entitled to sell. The conversion is made for the payment of the legacies. A mixed fund is formed, and the legacies are payable out of it. Interest should be allowed upon the legacies from one year after the testator's death; and costs should come out of the proceeds of the realty.

June 7th, 1883. PROUDFOOT, J.—Denis Toomey, a farmer, made his will on March 11th, 1865, and died on August 9th, 1882; his widow died in January, 1883.

By his will he directed his executors to pay all his just debts and funeral expenses out of his personal property, and if that proved insufficient then he authorized them to sell so much of his real estate as would be sufficient to make up the deficiency. He then directed his land to be sold on the following conditions: \$1000 to be paid down, and the balance in yearly instalments with interest. Then he ordered the interest of all capital arising from the sale of the land to be paid yearly to his wife for her maintenance during her natural life. The testator then gave a number of charitable legacies amounting to \$870, and pecuniary legacies to his sister, nephew, and niece, amounting to \$925. There is no residuary gift. The questions for the opinion of the Court are:

1. Whether the legacies are payable out of the proceeds of the land.
2. If they are so payable, whether they bear interest from the expiration of a year from the death of the testator, or only from the death of the widow.

I think the testator has created a mixed fund to answer the purposes of his will. He apprehended the personalty would not suffice for payment of his debts, and directed enough real estate be sold to supply the deficiency; he then directed the whole of his real estate to be sold; and then he gave the legacies. The persons to sell, under our statute, R. S. O. ch. 107, are the executors, and they therefore are the persons to pay. The direction to convert is absolute, and the proceeds are to be applied by the executors. The test proposed by Sir Geo. Turner in *Tench v. Cheese*, 6 DeG. M. & G. 453, that in order to create a mixed fund there must be a direction for the sale of the real estate, so as to throw the two funds absolutely and inevitably together to answer the common purposes of the will, would suffice for the disposal of this question, though that test itself is said to be too rigid: *Allan v. Gott*, L. R. 7 Ch. 439. See *Wms. Law of Executors*, 8th Ed., Vol. 2, p. 1718; 3 Jarm. on Wills, 5th Am. Ed., p. 463.

The first question can only be answered hypothetically, if the personalty was not sufficient for payment of the debts then the legacies were payable out of the proceeds of the land, if it was sufficient they are payable out of the mixed fund. So far as the charitable legacies are payable out of the proceeds of the land they are void.

I have had more doubt upon the second question, as to whether interest is payable from a year after the death of testator, if the legacies are payable out of the land. As the whole interest of the proceeds of the land was given to the wife for life, the capital had to be kept invested by the executors and there was therefore no fund for the payment of legacies till her death.

The general rule is, that legacies carry interest after the expiration of a year from the death, though payment be from the condition of the estate impracticable, and though the assets have been unproductive. In *Wood v. Penoyre*, 13 Ves. 325, the testator gave a legacy of £9000, to be paid out of the Irish mortgage when it was got in: the legacy bore interest from one year after the testator's death and was

to be paid when the mortgage was got in. In *Lord v. Lord*, L. R. 2 Ch. 784, the M.R. points out the distinction between that case, and one where the payment of the money is a part of certain trusts which are to arise at a future time; for instance, if the bequest in *Wood v. Penoyre* had been in this shape "I direct when the mortgage is got in the produce of it shall be held by my executors upon trust to pay £900, to A. B., and the residue to C. D.," in which case interest would not be due from a year after the death of the testator.

In the present case the words import a present gift, and the legacy does not form part of a trust to be executed in the future.

So in *Freeman v. Simpson*, 6 Sim. 75, a testator gave legacy to his daughter and all his real and personal estate to his wife for life, and after her death he gave his real estate subject to this legacy to his son in fee. It was held that the legacy bore interest from a year after testator's death, and was raiseable out of the real estate in case the personal estate was deficient.

In *Turner v. Buck*, L. R. 18 Eq. 301, Sir Geo. Jessel, M.R., held, that, where a legacy was payable out of the proceeds of the sale of real estate, interest was payable from a year after the testator's death.

Where a legacy is charged upon real property and no day of payment is mentioned, interest is given from the testator's death.

The necessary conclusion seems to be that upon the legacies now in question interest is payable from a year after the testator's death.

Costs out of the proceeds of the real estate.

A. H. F. L.

[CHANCERY DIVISION.]

RE WETHERELL AND JONES.

Constitutional law—Taking evidence in this province to be used in foreign tribunals—B. N. A. Act sec. 92, sub-secs. 13, 14, 16—31 Vict. ch. 76 (D.)

Held, that the Act 31 Vict. ch. 76 (D.) is not *ultra vires* the Dominion Parliament, for the taking of evidence in one of the Provinces for use in foreign tribunals is not a subject which is assigned to the exclusive legislative authority of the Province by sec. 92 of the British North America Act, inasmuch as such proceedings are of extra-provincial pertinence, and do not relate to civil rights in the Province.

In this case the plaintiff obtained an order from Proudfoot, J., under 31 Vict. ch. 76, (D) for the examination of certain witnesses resident in Ontario, under a commission and letters rogatory from the Circuit Court of Cook County, Illinois.

On September 7th, 1883, the witnesses moved before the learned Judge to rescind his order, taking the ground that the Act in question, which was his only authority for making such an order, was *ultra vires*. The learned Judge refused the order asked, and the matter then came up by way of appeal to the Divisional Court on September 12th, 1883.

Wallace Nesbitt for the appellants. The Act in question comes within sec. 92, sub-secs. 13 and 14 of the British North America Act, under which civil rights in the Province and the constitution of the Courts are assigned exclusively to the Local Legislature. Before this Act the Courts had no power to make such an order. See *United States v. Denison*, 2 Ch. Ch. 176. If it is now within their power by this Act, it is an enlarging of the power of the Court, which can only be done by the Local Legislature. The whole authorities turn upon the single point that the Dominion Parliament can delegate duties to the Judges of our Courts, or create new subject matter for our Courts to deal with, providing such duties or subject are not assigned

exclusively to the Local Legislature. This Act assumes to grant to the Court a right not before existent in it as a Court. It is a dealing with the constitution of the Courts, which is a matter solely for the Local Legislature. I refer to *Cartwright's Cases* under the B. N. A. Act at pp. 171, 191, 193, 197, 203, 207, 209, 212, 213, 218, 230, 257, 510, 515, 519, 520, 542, 686-735; and *Taylor on Evidence*, 7th ed., p. 1101.

G. H. Watson, contra. The matter is one of international courtesy and comity, and is within the power of the Court. I rely on *Valin v. Langlois*, 3 S. C. R. 1; and *Re Niagara Election Case*, *Plumb v. Hughes*, 29 P. 261.

September 15th, 1883. *BOYD, C.*—Section 92, sub-section 14 of the British North America Act relates to "the Administration of Justice in the Province," as to which exclusive jurisdiction is vested in the Provincial Legislature. The controlling words of that sub-section are those I have quoted from the beginning of the clause, i. e., "the Administration of Justice in the Province." These are general words which embrace the particulars afterwards specified in the sub-section, which thus proceeds "including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these Courts." Under the general term of Administration of Justice is embraced the constitution, &c., of Courts, and procedure in the Courts. Thus in the Consolidated Statutes of Upper Canada, under the title "Administration of Justice," we find as sub-division 2 "Courts," and as chapter 22 of that sub-division "Common Law Procedure." The scope of sub-section 14 is further manifested by sub-sections 13 and 16, the former relating to property and civil rights in the Province, and the latter to all matters of a merely local or private nature in the Province. This legislation has reference to intra-provincial matters; such, namely, as are therein particularized.

But I do not think that the language is intended to include the matters legislated on in 31 Vict. ch. 76 (D.) That statute is to provide, as a matter of international courtesy, for the taking of evidence of persons living within the Province which is needed by foreign tribunals in suits being litigated out of the Province. Such legislation does not pertain to civil rights in the Province, nor to the administration of justice in the Province, nor to the constitution of Provincial Courts for the administration of justice in the Province. The term "constitution" in this connection was relied on by the appellant. But the primary and proper meaning of the word as here used is, as given in the dictionaries, "the act of constituting; formation." It is, I think, synonymous with the word "establishment," which is used in sec. 101 of the British North America Act.

The taking of evidence in this Province to be used in civil actions pending in foreign tribunals, is not a subject which is assigned to the exclusive legislative authority of the Province by sec. 92 of the British North America Act, because such proceedings are of extra-provincial pertinence and do not relate to civil rights in the Province. The line of reasoning in *The Niagara Election Case*, 29 C. P. 261, strikes me as applicable to the Dominion Act which is now impeached as *ultra vires*. The Dominion Parliament has in effect constituted the Courts of Ontario, and their Judges Dominion Courts for the purpose of taking such evidence in aid of foreign tribunals, as a matter of international comity. It is to be noted that Wilson, C. J., who originally dissented from the majority of the Court in 29 C. P. retracted that dissent, and expressed his approval of the Niagara case: *Regina v. O'Rourke*, 32 C. P. at p. 402. The whole argument for the appellant in this matter is answered by the observation of Lord Selborne in *Valin v. Langlois*, in L. R. 5 App. Cas. at p. 120: "There is nothing (in the Act) to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or

to give them new powers, as to matters which do not come within the classes of subjects assigned exclusively to the Legislatures of the Provinces."

The order appealed from is therefore properly made pursuant to a statute which was within the competence of the Dominion Parliament, and the appeal should be dismissed, with costs.

FERGUSON, J.—I am of opinion that quite enough is contained in the judgment in the case of *Valin v. Langlois*, 3 S. C. 1, S. C. in App. L. R., 5 App. Cas. 115, to indicate what the judgment should be in this case, and I concur in the judgment, and conclusion of the Chancellor that the appeal should be dismissed, and the order affirmed. I think there should be costs of the appeal.

A. H. F. L.

[CHANCERY DIVISION.]

WYLD V. MCMMASTER.

Interim injunction—Motion to continue same till appeal.

An interim injunction will not be granted in aid of a plaintiff, to preserve the subject matter of his action *in statu quo* long enough to enable him to obtain the decision of an Appellate Court on points already decided in other cases, against his contention, in Courts of first instance.

THIS was a motion to continue an *interim* injunction until the hearing of the case, under the circumstances which are set forth in the judgment.

The motion was heard before Ferguson, J., at Toronto, on October 16th, 1883.

J. H. Macdonald, for the motion. The cases are, no doubt, at present against us in Courts of first instance, and it will indeed be little use continuing the injunction unless it is continued long enough to enable us to appeal; but we *bonâ fide* wish to go the Court of Appeal, and think the injunction should, under the circumstances, be continued. *Davis v. Wickson*, 1 O. R. 369, and *Stuart v. Tremain*, 3 O. R. 190, shew that when the transferee gets the fund transferred, and passes it out of his hands, so that it cannot be ear-marked, and cannot be followed, the other creditors cannot make him account for the amount of the proceeds. I also refer to *McEddie v. Watt*, 17 C. L. J. 473; *King v. Duncan*, 29 Gr. 113; *Polini v. Gray*, L. R. 12 Ch. D. 438, especially at p. 444; *Turner v. Lucas*, 1 O. R. 623; *Macdonald v. Croucher*, 2 O. R. 243.

N. Hoyles and *W. Barwick*, contra. On the law, as it stands, the plaintiff has not a shadow of a chance of success, and his desire to go to the Court of Appeal to overturn decisions extending over more than twenty years, does not entitle him to succeed. We refer to *Labatt v. Bixell*, 28 Gr. 593; *King v. Duncan*, 29 Gr. 113; *Heaman v. Seale*, 29 Gr. 278.

October 22nd, 1883. FERGUSON, J.—This is a motion to continue the injunction. The plaintiff alleges that the defendants in a certain suit of *McMaster v. McGarvey* made a promissory note at the instance of McMaster (the plaintiff in that suit, and the defendant in this suit) for a large sum, the whole amount of his indebtedness to McMaster, in order to enable McMaster to recover judgment against them before judgment could be obtained by other creditors whom the plaintiff represents, and that for a part of this sum notes had been before given, which were then under discount by McMaster at the bank, McGarvey remaining liable upon them; and contends that this act was in contravention of secs. 1 and 2 of R. S. O. 118. At the argument the plaintiff's counsel admitted that the decided cases were against this contention, excepting the case of *McEddie v. Watt*, *supra*, and some expressions by some learned Judges of what their opinions might have been but for the decided cases. The argument proceeded chiefly on the assumption that the law is against the plaintiff's contention in the action, and the present contention of the plaintiff is, that the injunction should be continued, so as to keep the property (in this case the security) in *statu quo* until such time as he can have the case tried (anticipating a judgment against him), and then, by an appeal, have the law upon the point determined as he contends it should be, by the Court of Appeal. He relied upon the case *Polini v. Gray*, L. R. 12 Ch. D. 438, and the cases cited therein at p. 444. These, however, were not cases in which the contention was against what was admitted to be the law of the land, at all events for the time being. I have been referred to no case going as far as the plaintiff's contention. Property and funds have been often kept *in medio* pending an appeal in the same case upon a question of law, or one of fact, or rather, mixed law and fact; but I cannot but be of the opinion that that is quite different from what the plaintiff asks here. The plaintiff says that it is necessary to preserve the property *in statu quo*, because, according to late cases in our own Court, he

would, in case of his ultimate success, be without substantial relief unless this is done, and this is, perhaps, quite correct; but, on the other hand, is not the defendant entitled to the benefit of the laws as they really exist at the present time, or must property, which according to law is his be kept from him for perhaps a long period, to the end that the plaintiff may have it determined whether or not such existing law is as it should be.

I think the case entirely different from the cases in which the property was kept *in statu quo* pending an appeal; and, on the whole case, I am of the opinion that the motion to continue the injunction should be refused, and I think the refusal should be with costs.

Motion refused, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

BOULTON V. ROWLAND.

Mortgagor and mortgagee—Accounting—Costs.

Where a mortgagee sold under a power of sale in his mortgage, and the mortgagor afterwards brought action against him for an account, and payment over to him, of the surplus which he alleged was in the mortgagee's hands, and on taking the account, it was found a balance of \$136, was payable to the mortgagor: *Held*, that the mortgagee must pay to the mortgagor his full costs of suit.

THIS matter came up on further directions.

The plaintiff was a mortgagor and the defendant a mortgagee of certain premises, which the defendant had sold under a power of sale for \$5,517, the whole of which he claimed to be entitled to keep.

The plaintiff contended that there was a considerable surplus in the hands of the mortgagee which the plaintiff was entitled to, and brought this action for an account of such surplus and for payment.

The mortgage had been given for a supposed balance on an accounting between the parties, which the plaintiff impeached in his statement of claim as having been unfairly arrived at.

A reference was directed to the Master at London, who found that a sum of about \$136, which included over \$50 of interest, was payable by the mortgagee to the mortgagor.

R. Meredith now moved for judgment as to costs, and contended that, as the result of the suit was in favour of the plaintiff, he was entitled to his costs.

A. J. Cattanaeh argued that the usual rule in mortgage cases applied, relying on the case of *Cotterell v. Stratton*, L. R. 8 Ch. 295, and on the cases cited in *Seton* on Decrees, 4th ed., p. 1060; and that the case must be regarded as one virtually for redemption, or, at any rate as a suit between mortgagor and mortgagee on the footing of the mortgage; and that, looking at the issues raised, the defendant had substantially succeeded.

Little v. Brunker, 28 Gr. 191; *Brough v. The Brantford, Norfolk, and Port Burwell R. W. Co.*, 25 Gr. 43, and *McGillivuddy v. Griffin*, 20 Gr. 81, were also referred to.

October 22nd, 1883. FERGUSON, J.—This is a case in which the mortgagee had sold the lands embraced in his mortgage under a power of sale. The mortgage was not produced, and I assume that it was drawn according to the short form given by the statute. It was said that it was this kind of mortgage, and this was not denied.

The plaintiff claimed that the mortgagee, the defendant, was overpaid the mortgage money, interest, and expenses. This the defendant denied. A suit was brought, and the matter was referred to the Master at London, who found that there was a balance in the hands of the defendant, the mortgagee, of \$136.38.

The plaintiff now says that he is entitled to be paid his costs of suit and this sum by the defendant. It was admitted that if the plaintiff is entitled to the costs of the suit he should have full costs, notwithstanding the amount recovered being so small.

The matter of costs was the only one in contention.

Counsel for the defendant contended that, as he had been a mortgagee, he was entitled to his costs, and could not be made pay costs under the circumstances. He relied upon the cases referred to in *Seton* on Decrees, pp. 1060, 1061, and particularly on the case of *Cotterell v. Stratton*, L. R. 8 Ch. App. 302, as to the right of a mortgagee on foreclosure or redemption as to costs, and also as to the right of a trustee to costs.

This, however, is not a foreclosure or redemption suit, and I do not think the rules as to costs in such cases apply, and I was not referred to any cases shewing that a trustee (if the defendant were considered a trustee of the money for the plaintiff), who resists payment to his *cestui que trust* of a proper demand, is entitled to costs of a suit brought to recover it.

The case seems to me to be the case of the defendant
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having received money to the use of the plaintiff and being sued for that money. In such a case the plaintiff may be necessitated to go through a long account to prove his case, but that could not disentitle him to costs. In this case there was a reference instead.

In the absence of any authority directly upon the point, and none was referred to, I am of the opinion that the plaintiff should have his costs of suit.

In *McGillicuday v. Griffin*, 20 Gr. 81, the decree gave the costs of suit against the party whom the Master should find indebted to the other party after a sale under a power of sale in the mortgage.

There will be an order that the defendant pay to the plaintiff the amount found due, with interest and costs of suit. Taxation before the Master at London.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

HATELY ET AL. V. MERCHANTS' DESPATCH
COMPANY ET AL.

Carrier—Bill of lading—Condition against liability for negligence—Construction of—Judgment against three defendants—Separate appeals to Court of Appeal and Divisional Court.

The plaintiff, consignor, consigned butter to his co-plaintiffs, consignees, in England, and shipped it by the defendant companies under a contract with the defendant Despatch Company, on through bills of lading, making it deliverable to order or assigns, and endorsed by the plaintiff to his co-plaintiffs, his vendees, in England, at a through rate paid to the Despatch Company, and apportioned amongst them and the two other defendant companies by agreement. The butter was carried by the defendants, the Great Western Railway Company, from London, Ontario, to New York, and there delivered in good condition on a barge belonging to the defendants, the Great Western Steamship Company. It remained on the barge through the negligence of the latter company for some days during very hot weather, whereby it was damaged, and it was in that condition received by the consignees. By clause 8 of the bill of lading it was stipulated that "the consignees, or party applying for the goods, are to see that they get their right marks and numbers, and after the lighterman, or wharfinger, or party applying for the goods, has signed for the same, the ship is to be discharged from all responsibility for mis-delivery or non-delivery, and from all claims under this bill of lading." Osler, J., who tried the case, found in favour of the plaintiff, and gave a general verdict against all the defendants.

Held, per HAGARTY, C. J., affirming the decision of Osler, J., that the condition on the bill of lading should, notwithstanding the general words at the conclusion, be restricted in its application to cases arising from misdelivery or non-delivery, and did not relieve the defendants, the steamship company, from liability for actual negligence, but that the railway company were not liable.

Per CAMERON, J. The condition in the bill of lading, by its concluding general terms, absolved the defendants from liability for the negligence complained of.

It appeared that the Despatch Company had given notice of appeal to the Court of Appeal from the decision of Osler, J., before the other defendants appealed to this Court. *Per ARMOUR, J.* Where there is a general judgment against several defendants Rule 510 does not permit them to sever and appeal to different Courts, but they were all bound to appeal to the tribunal to which the defendant taking the first step had appealed, and on this ground, the appeal should be dismissed.

THIS case was tried at Toronto before Osler, J., without a jury.

It was before this Court after the first trial, and the judgment is reported in 2 O. R. 385.

not against all, that such increased expenses or costs be paid by the defendants ultimately unsuccessful.

During the examination of one of the witnesses for the defence, counsel for the defendants, The Merchants' Despatch Company and the Great Western Steamship Company, desired me to rule that they were not obliged to give any evidence on the questions arising in the action between the defendants themselves until I had determined whether the plaintiff had a right to recover at all against any of them. I held that all the evidence they intended to give, as well against the plaintiff as against each other, should be given in that trial, and that I would not hear the case piecemeal, or receive such evidence afterwards at any stage of the case. All the defendants thereupon announced (not abandoning the order already mentioned) that the evidence given by them was given in answer to the plaintiff's case only, and that they would offer no evidence as against each other. Much of the evidence was really to some extent in support of the plaintiff's case, and if any right of contribution or indemnity existed at all as between the defendants themselves it might also be material in that aspect of the case. I am not satisfied that the order in question was one which could have been properly made under the Judicature Act, or if it could that it ought to have been made in the circumstances, tending as it necessarily does to largely increase the costs, and encumber and embarrass the proceedings in the action. I only refer to it here because the course taken by the defendants at the trial may have a bearing on the question of costs.

As against the defendants, the Despatch Company, the plaintiffs are entitled to recover. The contract with them is evidenced, as I think, by the four telegrams of the 22nd August, which passed between the plaintiff Hately and Mr. Barr (a), who, I find as a fact, was the agent of those defendants duly authorized to make such a contract. I think the defendants by that contract agreed that the butter should go by a ship sailing on the 27th August, so far as that is material.

It is true the circular or advertisement which the plaintiff had seen spoke of "intended sailings" only, but he might well assume that Barr had ascertained by communication with his principals in New York that a vessel would sail on that day; and considering the season and the nature of the consignment, it was important that it should

(a) See page 744.

not be shipped until the sailing date was definitely known. I do not attach any special significance to the expression in Barr's second telegram, "If they will take it," in reference to the sailing on the 27th, because in the same message he says he will "wire New York to place;" and the last telegram, sent, as may be inferred, after he had done so, expressly directed the plaintiff to ship the butter. Nor can the plaintiff be affected by the knowledge which at that time his New York agent, Templeton, may have had of the dates of sailing, for he was not his agent in that particular transaction, and the agreement was not made through him.

I find that the butter was delivered to the defendants, The Great Western Railway Company, in good order and condition at London, and I think there is nothing in the evidence which would warrant me in finding that it did not arrive in New York in the same condition, notwithstanding some delay for which all the defendants would be answerable, caused by their disputes on disagreement as to the division of the rate.

But for this I think it could have been sent forward in time for any ship leaving New York on the 27th August. No vessel of the Edwards or Great Western lines, however, sailed before the 3rd September. On that day the "Dorset" sailed, but without the plaintiff's butter. I find that it could and ought to have been shipped at the very latest by that vessel, and that up to the 3rd September there is no reason to suppose it had been injured by the delay. After that time it remained for some time upon the barge of the steamship company, upon which the connection of the Great Western Railway Company had delivered it, on the East River, exposed and evidently sustaining serious injury from the heat of the weather. I think there can be no reasonable doubt that the condition in which it was afterwards found arose from this cause, and for the loss sustained in consequence I think that the Despatch Company are responsible.

The other defendants, as at present advised, I also hold to be liable, notwithstanding the conditions in the bill of lading, on the ground of their actual negligence and want of care in the transmission of the goods; the railway company, because it was their duty to see that the goods were actually delivered to the steamer, or on the steamship company's pier, instead of contenting themselves as they did with delivery on board of a barge; and the steam-

ship company, because, having received them on their barge for shipment by the "Dorset," they failed without any tangible reason to put them on board, and entirely neglected to take any precautions against the goods being injured by the heat while waiting for the next steamer.

The plaintiffs are entitled to recover as damages the loss sustained in consequence of the deterioration in the quality of the butter; that is to say, the difference between the price the butter would have brought in the condition in which it was shipped, and that actually realized—\$1,547. I do not make any allowance for telegrams, surveyors' charges, or damages on protest of the plaintiff Hately's bills of exchange drawn against the bills of lading, these, as it seems to me, not being damages which can be reasonably said to have been in contemplation of the parties as resulting from a breach of their contract.

I direct judgment for the plaintiffs for the sum of \$1,547 and interest from the 17th January, 1882, against all the defendants, with costs of suit other than the costs of the first trial and of the motion for the new trial, which were reserved to be disposed of by the Court.

From the course taken by the defendants at the trial, I am unable to pronounce any finding as to their liability as between themselves, or to say whether any one of them should indemnify the other against loss arising out of any of the matters in question.

The Merchants' Despatch Company did not move against the learned Judge's finding. The other defendants moved separately.

November 30th, 1883.—*Osler, Q. C.*, and *Plumb*, for the Steamship Company. The defendants delivered the goods as they received them, *i. e.*, damaged. The shipping bill shews their contract and liability. The judgment is wrong, because it finds that the butter was injured on the "Lighter," and so the Steamship Company is not liable. The lighterman was agent only for the Merchants' Despatch Company, and, as he said, he had nothing to do with the Steamship Company. He admitted that the damage was all done on the lighter before 3rd September, the date of defendants' receipt of the goods. The receipt at Liverpool was an absolute discharge of all the defendants, notice not being given of a patent defect. No claim was made for

six weeks. In any case the butter was destroyed by the extraordinary heat. The plaintiff, it is true, had provided ice, but he should have provided it to the end of the transit. This loss was an act of God. The defendants iced to New York, and the plaintiff should have provided ice at New York. *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197, does not govern, because the statute does not apply in this case: *Browne on Carriers*, 86-7. Plaintiff cannot bring an action against the three defendants without shewing which are chargeable with the damage, and an innocent defendant must be discharged. Moreover, the Merchants' Despatch Company have not given any evidence against these defendants.

S. H. Blake, Q. C., and *Millar*, for the Merchants' Despatch Company, referred to *Laughlin v. Chicago and North Western R. W. Co.*, 28 Wis. 204, as shewing that the last carrier is liable.

Cassels, Q. C., for the Great Western Railway Company, cited Ontario Judicature Act Rules 91, 94; *Harvey v. Great Western R. W. Co.*, 7 A. R. 718. The Great Western Railway Company have cleared themselves of negligence: *Harvey v. Great Western R. W. Co.*, 9 P. C. 80. The judgment of the learned Judge at the trial practically exonerates the defendants.

Moss, Q. C., for the plaintiff. Under Rule 94 all the defendants are rightly joined. There is also a several contract with each, and each is liable to the plaintiff to carry to the end. He cannot relieve himself by the fact that the damage took place while the goods were in the hands of another defendant: *Muschamp v. London and Preston Junction R. W. Co.*, 8 M. & W. 421; *Wilby v. West Cornwall R. W. Co.*, 2 H. & N. 707; *Booth v. Biscoe*, 2 Q. B. D. 196; *Child v. Stenning*, 11 Ch. D. 82. But none of the defendants have succeeded in relieving themselves. The Great Western Railway Company are liable on their conditions until the goods have either got on board ship, or on the Steamship Company's pier: *Henderson v. Stevenson*, L. R. 2 H. L. Sc. App. 470. The

conditions do not apply to a case of negligence: *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 601, S. C. 5 S. C. 204; *Phillipps v. Clark*, 2 C. B. N. S. 156; *Gill v. Manchester R. W. Co.*, L. R. 8 Q. B. 186; *D'Arc v. London and North Western R. W. Co.*, L. R. 9 C. P. 325; *Lyon v. Mells*, 5 East 427.

February 16, 1884. HAGARTY, C. J.—The Merchants' Despatch Company was incorporated in the State of New York, one Barr being their agent here in Toronto.

They undertook contracts of freight to almost all points in the United States, to England, and elsewhere.

They had traffic arrangements with the Great Western Railway Company of Canada, the New York Central, and Hudson River Railway, and the defendants, the Steamship Company.

The evidence from the telegrams, letters, and oral testimony leave no room for doubt that this despatch company contracted with the plaintiff for carriage to England at a through rate.

The evidence very clearly shews a large damage to the butter shipped, and the original contractors for carriage should be held responsible therefor.

I concur in the remarks of my learned brother as to the great embarrassment and inconvenience caused by the joinder of these several defendants.

I do not see what other course he could have taken in dealing with the evidence at *nisi prius*.

I understood from the various counsel in argument that we are not asked to decide as to the rights of the several defendants against each other, but merely as to plaintiff's right to recover against one or more of them.

I find the facts apparently to be thus: The butter came down from London to the Bridge, and in consequence of some confusion as to the apportionment of the rates of carriage it was detained for the best part of a day on the American side, and was then sent down to New York via Central Railway in a properly iced car.

I see no reason whatever for finding that any damage was sustained by the butter up to its arrival at New York, or any actionable negligence up to that time. So I should find as a juror.

It arrived at the Bridge in a Merchants' Despatch car for butter or fruit, and was properly received.

On the morning of 25th August the car was handed over to the New York Central Railway, and went east that afternoon.

It arrived in New York on Sunday morning, 28th August. This was said to be fair average time, and I see no evidence to the contrary.

Mr. McIlhaney appears to be the general freight agent at New York, and Barr, the agent here, was in constant communication with him as to this shipment, and advising him thereof. It was understood that urgent despatch was required by the first available steamer.

The "Dorset" and the "Bristol," vessels of the defendants' Steamship Line, were to go apparently the first week in September, and the parties in New York seem to have been fully advised.

A great deal of evidence was given as to the precise time when the butter could be considered as delivered to and under the contract of the steamship company.

It was sworn that no freight is ever sent down to the steamship company's vessels until the latter company notify their readiness, and give what is called a permit to send goods by a named ship. The permit in this case cannot be found, or is not produced.

The evidence of Louis Saphel at the trial explains the course of proceeding. He is clerk of McIlhaney. His order is produced, dated August 29th.

It is addressed to Haskill, agent of railways, and of the different depots where freight is received. It directs delivery to steamer "Dorset," at pier 18, East River, of this butter, adding, "would like to have it to-day if possible but will receive early to-morrow morning."

The clerk says he could not have put in the name of the steamer unless he had their permit.

The New York Central have a lighterage department. Knickerbocker, a witness, was in that department. He says he received this order from McIlhaney's office. A permit was then, as usual, attached to the order. He communicated with the station to deliver the property. He says they will receive no order without a permit. He produced his telegram to deliver to "Dorset" same day, 29th August.

Geo. W. Haines, examined on commission, swore that he was in the employ of the New York Central, and through them for the Merchants' Despatch Company; that about 1.30 p. m., on 29th August, he took on board his Lighter this butter at 65th street, finished loading about 5 p. m. He took the butter from the car, a new car which had about six tons of ice in it; thinks it was in good condition when he got it; kegs perfectly clean.

This witness considers that butter would have been all right if taken when he first brought it to pier 18.

A tug came at 11 p. m., and took him down to pier No. 4, and from thence, at 7.15 a. m., to the pier where the "Dorset" lay, on the morning of 30th August.

The "Dorset" was then discharging; could not get alongside; could not get into the slip till afternoon; and there he blocked up the slip entirely. Lay there that afternoon and night.

That in the morning when he first reached the pier, he delivered the papers annexed to the commission marked 1 and 2, to the steamship company's clerk on the wharf. These papers set forth the shipment of butter, and name of barge, and where it came from, name of steamer and destination, &c. He said he told the clerk it was butter, and the clerk said it was all right.

At 8 a. m. next morning, 31st August, a stevedore came and said he must clear the slip, and that he would take his barge and tow it over to Brooklyn, and leave him there three or four hours. The stevedore got a tug and towed him over and left him there. The tug did not belong, he said, to his railroad or the despatch company.

He lay at Brooklyn till September 2nd, at 11 a.m.; the same tug came and took him back. They commenced to unload at 2:30 p.m., that day, and finished September 3rd, at 5 p.m. When they unloaded he saw the butter running out of the kegs in quantities. The weather was very hot.

The day after they took him to Brooklyn he went to the stevedore and asked how long he was to be kept. The stevedore said: "You stay over there till I get ready to come after you. * * When I want you I will send a tug after you." This was the same stevedore who ordered him to go to Brooklyn.

A receipt was given by Armstrong, receiving clerk, for the goods on the 3rd September, to go by "Bristol."

The "Dorset" sailed on the 3rd September, but did not take the butter.

Templeton, a witness resident in Brooklyn, on receipt of a telegram from the plaintiff on August 30th, went to Pier 18 where the "Dorset" lay, and in their office on the pier saw Armstrong, the receiving clerk of the Steamship Company.

He enquired about the butter and shewed him plaintiff's telegram. The clerk said it was all right, that the butter was here this forenoon. Templeton asked when the "Dorset" would go. The clerk said probably on the 2nd September. He said the butter was received that forenoon.

This was about four in the afternoon. He says that from what passed he had no doubt the butter had been received, and would go in the "Dorset."

He telegraphed so to the plaintiff next day: "Butter in Bristol steamer 'Dorset.' Sailing Thursday."

McIlhaney's evidence corroborates all this circumstantially.

Flannery, who had been for years the only stevedore of the Steamship Company, was examined at great length. He professed to have no recollection whatever of the shipment of this butter, or of having given any orders about sending it to Brooklyn, or bringing it back. Denies that he ever employs tugs to remove lighters, &c., but appeals

to the harbour master, and sometimes for him he hails a tug to come.

Raymond, a tug proprietor, remembers nothing of this matter, but says he was often employed to move lighters about the pier, and sometimes Flannery, the stevedore, would say that he would like the tug to get that lighter or canal boat here or there about the pier.

Morgan, the general agent of the Steamship Company was examined. He denied all knowledge of a permit having been issued. He admitted the general arrangement with the Despatch Company and the railways for the forwarding of through freight, and that freight like butter should go by the first ship after receipt, but contends that this freight never got alongside the "Dorset." He did not know of the difficulty till after the butter was put into the "Bristol." He admits the stevedore sometimes employs tugs on special authority given, and they have a general contract with a tug boat man for a certain amount per steamer, and he, apparently, does all work required. He says the receiving clerk has nothing to do with goods on lighters, only when put on the dock : that if the butter had been put on the dock, or alongside the steamer on 30th or 31st August, it would have gone on the "Dorset." On the back of the receipt given by receiving clerk there is a printed extract from bill of lading. He admits notice from McIlhaney of this shipment having been sent from Canada about August 23rd.

A notice is attached to his examination, dated 29th August, from McIlhaney of the arrival at New York of the property engaged to be sent to Bristol, describing this butter, and requesting permit at once. The receipt of this is admitted.

At the trial it was proved by the agent, Morgan, that the steamship carried the goods on a contract made with the Despatch Company under their bills of lading 2, 3, 4, 5, and 6.

The "Bristol" appears to have been lying at Brooklyn on 30th August. She afterwards came over to pier 18. She sailed from New York on 7th September with the butter.

I cannot find that Armstrong, the receiving clerk, was examined. His father, for whom he was temporarily acting, was absent at that time, and was examined at prodigious length. I presume, because he knew nothing very important.

The evidence is most voluminous, taken at inordinate length, and with wearisome iteration and technical objection and exception. It is much to be regretted that suitors have to incur an amount of expense so disproportionate to the value of the matter in dispute.

The evidence, I think, shews that there was no negligence proved or damage incurred to this butter during its passage from London via the Great Western to the Suspension Bridge, and from thence over the New York Central to New York: that it was not unreasonably delayed, and was carefully iced: that there was no evidence to shew negligence or damage down to its arrival on the morning of August 30th, at pier 18, where the steamer "Dorset" was lying.

I think the evidence is clearly in favour of our finding that the Steamship Company had been duly notified about 23rd August of this shipment intended for them, and that on 29th August they sent the usual "permit" to McIlhaney's office for shipment of the butter by the "Dorset:" that with proper care and despatch the New York Central lighter, on this authority from the steamship company, took the butter to the pier 18, and notified the receiving clerk of that company on the pier, giving him the papers and informing the company through him that the butter was then at the pier: that the said company, through their stevedore, ordered the lighter in which they knew this butter was away from their pier, and had it taken over to Brooklyn: that next day the lighterman came and remonstrated at the pier, and was told by the company's stevedore that he must stay there till he was sent for: that the company brought him back to pier 18 on September 2nd, and that afternoon commenced loading, and finished next day on the "Bristol," which did not sail till

7th September, the "Dorset" sailing on 3rd September, the day the butter was fully loaded on the "Bristol."

I consider Templeton's evidence, as to what took place between him and the receiving clerk on August 30th, as corroborative of the lighterman's account of the affair.

I find that the damage done to the butter was certainly done while on board the lighter, and after its arrival at pier 18.

I also hold that on the evidence the butter must be considered as in the hands of the Steamship Company from the morning of the 30th August, and that it was through the action of their officers that the extraordinary delay causing the damage was allowed to take place.

I find as a question of fact that the Great Western Railway, the New York Central Railway, and this steamship were all engaged in the carriage and transport of freight from this Province to Bristol, in England, and that the defendants, the Merchants' Despatch Company, solicited and took contracts for freight at through rates, such through rate being apportioned by agreement between the different companies concerned in the carriage.

The Steamship Company admit that they carried on the through bill of lading given on shipment at London by the Great Western Railway. Clause No. 7 therein is endorsed on the receipt for the butter, given by the receiving clerk to the lighterman on date of 3rd September. The bill of lading is headed:

"Foreign bill of lading. Great Western Railway, Merchants' Despatch Transportation Company, and the Great Western Line of S. S. from New York, from London, Ontario, to Bristol, England."

The agent signing professes to do so for the Great Western Railway, its connections and Steamship Companies.

"Signed, WM. BROWN,
Agent severally, but not jointly."

Sec. 2 provides that the Great Western Railway and its connections shall not be answerable for damage to perishable property of any kind occasioned by delays from any cause, or from change of weather.

Sec. 4. That the company alone shall be answerable for loss or damage in whose actual custody the same may be at the happening of such loss.

Sec. 6. That the liability of the Great Western Railway and its connections as common carriers terminates on delivery of the goods to the steamer or Steamship Company's pier at New York, when the responsibility of the steamship company commences, and not before.

Sec. 7. That the property shall be transported from New York to Bristol by said Steamship Company, to be delivered from the ship's deck in like good order and condition at Bristol with certain exceptions, as from sweating, leakage, breakage, or from stowage, &c.

I do not think the injury done to this butter, by neglect prior to actual shipment, can be excused under any of these exceptions in a case like this.

Sec. 8 declares that consignees or parties applying for goods are to see that they get their right marks and numbers, and after the lighterman or wharfinger, or the party applying for the goods, has signed for the same the ship is to be discharged from all responsibility for misdelivery or non-delivery, and from all claims under this bill of lading.

It was urged, on behalf of the Steamship Company, that the receipt of the butter by the consignees in Bristol and Cardiff was an absolute discharge to them from all responsibility. I do not agree to this. We must give the clause already cited from section 8 a reasonable construction. I do not think it makes out a defence. Misdelivery and nondelivery are the things aimed at, and the clause should not be extended further.

The evidence called by defendants went to shew that externally the kegs appeared right: external damage to one keg is specially noted in one of the receipts.

It only remains to decide whether judgment should be against all the defendants or not.

Absolute justice, apart from any technical rule, would suggest that the defendants, the Great Western Railway Company, should be absolved from liability, and judgment be against the Despatch Company and the Steamship Company, with full costs, as joint tort feorsors.

The judgment of the Privy Council, in *Moore v. Harris*, L. R. 1 App. Cas. 318, not cited on the argument, seems the strongest in favour of defendants.

There the condition was: "No damage that can be insured against will be paid for, *nor will any claim whatever be admitted unless made before the goods are removed.*"

The goods (tea) were shipped from England as through freight to Toronto, to be delivered in Montreal to Grand Trunk Railway Company, and thence to Toronto.

It appeared that the tea was damaged on board the ship by chloride of lime used for disinfectant purposes.

On the 13th, 16th, and 17th May the tea was taken to the plaintiff's warehouse from the railway station in Toronto.

On the 18th and 27th May the tea was examined and found injured; no notice was given to the defendants, the ship owners, till the 30th May.

The judgment is very full. The Court say, at p. 329: "When a condition to this effect is found in a bill of lading, expressed in language which in its ordinary and natural sense includes all damages, whether latent or not, can the Courts undertake to say that it is so unreasonable that the parties could not have meant what they said? * * No reasons for narrowing the scope of the condition can be gathered from the general tenor of the instrument, which is manifestly framed throughout with a view to exempt the ship-owners (as far as could be foreseen) from liability for damage."

The object and fairness of such conditions are much discussed.

We must bear in mind that in our case the damage is shewn to have occurred through the shipowners' negligence after the goods had come under their control and before actual shipment.

Then the condition already cited ought, I think, to be read not as the condition in *Moore v. Harris*, of an absolute character covering every contingency, but as referring to and narrowed by its own subject matter. Parties are to see that "*they get their right marks and numbers*," and after they have signed for the same the shipowner is to be discharged from all responsibility for misdelivery or nondelivery, and from all claims under this bill of lading.

I think this should be read as confined to responsibility as to the right marks and numbers, and to misdelivery or nondelivery.

No bill of lading was actually given in New York by the Steamship Company. Their receipt for the goods has printed on its back the extracts from the bill of lading, clause No. 7; but No. 8, the clause as to receipt of goods in England, does not there appear.

I think we should carefully confine any condition assuming to discharge the carrier from all responsibility for negligence clearly proved against him to the narrowest limit consistent with fair interpretation, and with this view I distinguish it from the unequivocal and universal condition in *Moore v. Harris*.

The tendency of the authorities seems to me to be against extending these conditions where actual negligence is clearly proved.

I may refer to such cases as *Martin v. Great Indian Peninsular R. W. Co.*, L. R. 3 Ex. 12; *Czech v. General Steam Navigation Co.*, L. R. 3 C. P. 14; *D'Arc v. London and North-Western R. W. Co.*, L. R. 9 C. P. 325.

Our own Parliament has passed statutes to prevent railway companies from contracting themselves out of liability where actual negligence is shewn.

On the whole I think the judgment should stand against the Despatch Company and the Steamship Company, with full costs of suit from the beginning.

I think the judgment should be in favour of the defendants, the Great Western Railway Company.

But under all the circumstances of this very peculiar case, the traffic arrangements entered into by the defendants *inter se*, and the apparent joint determination to resist this unfortunate plaintiff's claim at enormous expense, I think there should be no costs of defence for this company against the plaintiff.

ARMOUR, J.—This cause was tried by Mr. Justice Osler, without a jury, at the last Summer Assizes for the City of Toronto, and judgment was given by him against all the defendants on August 2nd, 1883, for the sum of \$1,547, with interest from January 17th, 1882, and with costs other than those reserved by this Court on the granting of the new trial herein. The first named defendant gave notice of appeal from that judgment to the Court of Appeal, and each of the other defendants afterwards served notice upon the plaintiff and upon the other defendants of its intention to apply to this Court to set aside the said judgment so far as it affected it, and argument was had upon these applications on the 30th November, 1883, and it was admitted on the argument by the counsel for all parties that the first named defendant had appealed to the Court of Appeal; and it is said that rule 510 permits this course to be adopted, and that under its provisions one defendant can apply against a joint judgment given against two or more defendants by a Judge who has tried the cause without a jury to the Court of Appeal, and that the other or other defendants can apply against the same judgment to the Divisional Court. If this rule permits this to be done by defendants against whom there has been a joint judgment recovered it must also permit it to be done by joint plaintiffs whose action has been dismissed. Thus A and B, partners, having sued for a partnership claim, and their action having been tried by a Judge without a jury and dismissed, A can apply to the Court of Appeal for a reversal or variation of the judgment against

him, and B can apply to the Divisional Court for a reversal or variation of the judgment against him. A will have to bring B before the Court of Appeal on the hearing, and B will be entitled to be heard there in protection of his rights, and B will have to bring A before the Divisional Court on the hearing, and A will be entitled to be heard there in protection of his rights, and the defendant will be harassed and vexed by being brought before both Courts; and the result may be that the Court of Appeal will dismiss his appeal, and that the Divisional Court will allow B's appeal, or will grant him a new trial.

In this case the plaintiff has recovered against all the defendants a joint judgment for the same cause of action arising out of a breach of the same contract. The first named defendant has applied to the Court of Appeal for a reversal or variation of the judgment as against it. Each of the other defendants has applied to this Court for a reversal or variation of the judgment as against it. The first named defendant will have to bring the other defendants before the Court of Appeal on the hearing, and each of them will be entitled to be heard there in protection of its rights. Each of the other defendants has brought the first named defendant before this Court, where it has been heard as it was entitled to be in protection of its rights. The plaintiff will be brought before the Court of Appeal on the application of the first named defendant. He has already been brought before this Court on the application of each of the other defendants; and he has a bright prospect, after being brought before the Court of Appeal by the first named defendant upon the decision of Mr. Justice Osler, of being again brought before the Court of Appeal by the other defendants upon the decision of this Court. I do not think that rule 510, by any fair and reasonable construction, can be held to authorize any such mode of proceeding as has been adopted in this case.

I think that all the defendants intending to apply against this judgment were bound to go to the same tribunal. If they could not agree upon the tribunal to which

they would go, the others were bound to follow that one that took the first step. The first named defendant took the first step, and made its application to the Court of Appeal before the others took any step to apply to this Court. I think that this being the case, the other defendants were bound to apply to the Court of Appeal, and could not properly apply to this Court. Whatever propriety there may have been in joining so many defendants, and whatever propriety there may have been in joining so many plaintiffs, there is, in my opinion, no propriety whatever in joining so many Courts.

In my opinion therefore the application must be dismissed, with costs.

CAMERON, J.—The only defendants now before this Court are the Great Western Railway Company and the Great Western Steamship Company. The former, I am of opinion, fully performed its duty, and fulfilled its contract to deliver the butter to the Steamship Company at their pier, New York, and that such delivery took place before any injury had been sustained by the butter; and under the 6th condition of the bill of lading the liability of that company then terminated, and that of the Steamship Company began. Under the evidence it appears to me the injury to the butter was caused by the act of the Steamship Company in not putting it on board their ship when taken to their pier in the lighter—that such taking under the permit they had given to the New York Central to deliver the butter to them was an acceptance of the butter by them, which subjects them to liability for its injury and deterioration while on the lighter, which by the orders their stevedore gave to the lighterman must be deemed to have been under their control from the time its arrival at the pier was notified to the company up to the time the butter was taken off the lighter; and it was between those periods the damage was done. The only question then is, are they relieved from responsibility under any of the conditions of the bill of lading?

I feel much regret at being forced to say that I think they are so relieved under the 8th condition, which, after providing for many things in respect of which the company is exempted from liability, contains this provision :

“ The consignees or the party applying for the goods are to see that they get their right marks and numbers, and after the lighterman or wharfinger, or party applying for the goods, has signed for the same the ship is to be discharged from all responsibility for misdelivery or non-delivery, *and from all claims under this bill of lading.*”

No claim whatever was made against the Steamship Company till some considerable time after the consignees received the butter and signed the receipt for the same in accordance with the condition. This, under the decision in *Moore v. Harris*, L. R. 1 App. Cas. 318, would seem to relieve them from responsibility.

I am unable to distinguish that case in principle from the present. The condition which secured the defendant's exemption in that case was: “ No damage that can be insured against will be admitted, unless made before the goods are removed.” In the present it is: “ And after the lighterman or wharfinger, or party applying for the goods, has signed for the same the ship is to be discharged from all responsibility for misdelivery or non-delivery, and from all claims under the bill of lading.”

The learned Chief Justice has expressed the opinion that the condition should read as if the words “ in respect thereof ” had been added to it, and the exemption only extends to claims in respect of misdelivery or non-delivery of the goods.

I can see no more reason for supplying such words than there would have been for inserting into the condition in the bill of lading, in *Moore v. Harris*, words so as to make it read, “ no damage that can be insured against will be paid for, nor will any claim whatever be admitted in ‘ *respect of such damage*,’ unless made before the goods are removed.”

It seems to me there would be just as much reason in one case as the other for the interpolation. The language

of Sir Montague Smith, in delivering the opinion of the Judicial Committee of the Privy Council, is applicable to the circumstances of this case. He says, at p. 328: "But the principal contention on behalf of the plaintiffs was, that whichever was the plan of removal referred to the condition should be confined to apparent damage. Now its language is plain and without any ambiguity. The first branch of it, 'no damage that can be insured against will be paid for,' although limited to insurable damage, clearly applies to such damage, whether apparent or latent. The words of the last branch are unlimited and universal, 'any claim whatever.' It was not indeed denied that these words would in their natural sense include all damage, but it was said they should be construed as the usual acknowledgment found in bills of lading, 'shipped in good condition,' has been, and confined to external and patent damage.

* * But in truth the supposed analogy does not exist. This is a condition for the shipowners' benefit, and it may well be that stale claims for latent damage were those against which he most desired to guard. * * A shipowner may choose to say, I will not be liable for any damage to an article of this kind, unless a claim is made so that it may be looked into and checked by my agents before the goods are removed from their control; and when a condition to this effect is found in a bill of lading, expressed in language which in its ordinary and natural sense includes all damage whether latent or not, can the Courts undertake to say it is so unreasonable that the parties could not have meant what they have said? No doubt this condition may bear hardly on consignees, but so also may the very large exceptions to the responsibility of the shipowner inserted in the body of this bill of lading. Certainly no reasons for narrowing the scope of the condition can be gathered from the general tenor of the instrument, which is manifestly framed throughout with a view to exempt the shipowner, as far as could be foreseen, from liability for damage. It may be that this has been done to an unreasonable extent, but the plaintiffs are mer-

chants and men of business, and cannot be relieved from an improvident contract, if it really be improvident. Possibly in shipping under bills of lading thus framed, he merchant gets a corresponding advantage in a lower rate of freight."

I make this lengthy extract from the opinion of Sir Montague Smith, because it appears to me to cover the points raised in respect to the construction to be put upon the said 8th condition of the bill of lading, and as it is the language of a judgment in a Court of final resort, as far as this Province is concerned, it must necessarily have more weight than anything I myself could advance as reasons for deciding against the plaintiff's right to recover. The conduct of the Steamship Company has been so unreasonable and reprehensible in reference to their dealing with the butter, that they ought not to recover any costs against the plaintiff.

Judgment accordingly.

NOTE.—Telegrams referred to in the case.

August 22nd, 1881.

To JOHN BARR.

Will give you car butter, London, 300 packages for Bristol; one for Cardiff. Will ship Tuesday, for Saturday's steamer, at 63 cents. Say quick if you accept and if can get it through.

W. C. HATELY.

August 22nd, 1881.

To W. C. HATELY.

64 best can do. Steamers 27th, if they will take it. Answer, and will wire New York to place.

JNO. BARR.

August 22nd, 1881.

To JOHN BARR.

Your list says steamers Bristol and Cardiff Saturday. Will ship butter to-morrow for them at rate you name. Accept Thorndale rate. Advise London and Thorndale.

W. C. HATELY.

To W. C. HATELY.

Ship your London butter via Great Western. You can get refrigerators there. I have advised Western.

JNO. BARR.

A DIGEST
OF
ALL THE CASES REPORTED IN THIS VOLUME
BEING DECISIONS IN THE
QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY
DIVISIONS
OF THE
HIGH COURT OF JUSTICE FOR ONTARIO.

ABANDONMENT.

By sheriff of goods seized under execution.]—See EXECUTION, 1.

ACTION.

Against administrator for fraud of deceased — Partnership.] — See FRAUD, 1.

Of trespass—Actual occupation of land not necessary.]—See TRESPASS, 1.

ADMISSIONS.

Admission in pleadings.] — See PLEADING, 1, 2.

AMALGAMATION.

Of railway companies.]—See RAILWAYS AND RAILWAY COMPANIES, 3.

AMENDMENT.

Amendment in matter of account in Master's office.]—Where an amendment in a matter of account, as stated in the pleadings, would be allowed before decree, a similar amendment should also be allowed, if asked for, in respect of the accounts filed, after decree, in the Master's office. *Court v. Holland et al.*, 688.

Of pleading at trial of action on a policy of life insurance for purpose of setting up a forfeiture thereof.]—See CORPORATIONS, 2.

APPEAL.

Motion to continue injunction until appeal.]—See INJUNCTION, 2.

Separate appeals to Divisional Court and Court of Appeal by different parties in same interest.]—See CARRIERS, 1.

ARBITRATION AND AWARD.

1. Where by an order of reference the arbitrator was empowered to certify and amend pleadings and proceedings, and otherwise as a Judge at *Nisi Prius*, and costs of the reference, arbitration, and award were to abide the result of the award.

Held, that the arbitrator had no power to make any disposition of the costs, as they were provided for by the reference. *Devanny et al. v. Dorr et al.*, 206.

2. *Arbitration—Costs.*]—When the submission or order of reference is silent as to costs, arbitrators have no power to adjudicate upon them, but each party must bear his own costs and half those of the award.

A direction as to the costs in such a case, *Held*, severable from the rest of the award. *Re Harding and Wren*, 605.

Under statutory condition in policy of insurance.]—*See* INSURANCE, 1.

ASSESSMENT AND TAXES.

1. *Assessment—Taxes when due—Agreement—Arbitration—Costs.*]—Under the Assessment Act, the assessment is for the purpose of designating the person to be charged, but no debt is due until the rate on the dollar is imposed, and the amount of taxes thus ascertained and fixed.

By an agreement, dated November 4th, 1881, between one Q. and defendants, for the sale of Q's business, after a recital to the same effect, the defendant covenanted to pay, satisfy, and discharge all the debts, dues, and liabilities, whether due or accruing, contracted by said Q. in connection with said business, &c. Q. was assessed for goods sold

under the agreement before the making thereof, but the rate was not imposed and the amount of taxes ascertained and fixed until May, 1882, thereafter.

Held, that there being no debt until the rate was struck in May, 1882, Q. when he sold the goods should have applied to have the purchaser's name inserted instead of his own, or have expressly provided in his agreement that the purchaser should indemnify him against this amount; and that the said taxes were not a debt contracted in connection with said business within the terms of the agreement. *Devanny et al. v. Dorr et al.*, 206.

2. *Principal and surety—Collector's roll—Certificate—Entries on roll—Evidence—Commission, allowance of.*]—In an action against sureties for a town collector for his default in paying over the sum collected by him:

Held, (1) not necessary that the roll should be certified, but sufficient that it was signed by the town clerk; (2) that entries made by the collector on his roll in the discharge of the duties of his office of taxes paid to him were evidence against the sureties.

The jury, without any evidence to justify such finding, allowed the collector a commission of three and a half per cent. on the taxes collected by him:

Held, that this amount could not be allowed, and that the amount against the sureties must be increased by this amount, less a sum of \$75, which appeared, by a by-law put in by leave on the motion, to be the proper amount of remuneration to the collector, on defendants' pleading a plea which would justify plaintiffs'

in making such deduction. *The Corporation of the Town of Welland v. Brown*, 217.

3. *Municipal corporation — Tax sale where no taxes really in arrear — Mistake — Cancellation of tax deed — Notice — Parties — Remedy over against person not party*—*R. S. O. ch. 108, sec. 165.*]—The plaintiff was owner in fee of certain lands which were conveyed to him by deed of July 27th, 1868, registered August 11th, 1868. Subsequently, by mistake, the said lands were sold for taxes, although no taxes were actually in arrear; and by deed of March 11th, 1880, were conveyed to A. McL, the tax purchaser, which deed was registered May 18th, 1880. On November 29th, 1881, A. McL conveyed the said lands to J. W. by deed absolute in form, but intended as security for money advanced by J. W., which deed was registered December 1st, 1881. The plaintiff found out that this sale for taxes had taken place shortly before bringing this action, in which he sought the cancellation of the deeds to McL and J. W.

Held, that the plaintiff was entitled to have the deeds cancelled, and J. W. was entitled to judgment against A. McL for the moneys advanced by him.

Held, also, that the fact that the defendants might have a remedy over against the municipal corporation which had sold the land for taxes, did not make the corporation a necessary party to this action.

Held, also, that *R. S. O. ch. 180, sec. 165*, does not apply in a case where there have been no taxes in arrear at the time of the sale of the land for taxes. *Charlton v. Watson et al.*, 489.

4. *Sale of railway lands for taxes — Statute of Limitations — Assessment Act of 1869—32 Vic. ch. 36.*]—Under the Assessment Act of 1869, 32 Vic. ch. 36, the lands of railways might be sold for the non-payment of taxes.

The Statute of Limitations does not begin to run against a tax purchaser, until the period of redemption has expired.

Where it appeared that, as far as the county treasurer was concerned, all the steps taken by him in regard to the sale were regular, and authorized by 32 Vic. ch. 36, and that the sale had taken place for taxes actually in arrear for the required length of time, followed by a tax deed thereafter, which had not been questioned within two years.

Held, that the sale and deed were not afterwards impeachable, although it was not clear on the evidence, whether the county clerk and the assessor had or had not properly complied with the requirements of secs. 111 and 112 of the said Act. *Smith v. The Midland Railway Company*, 494.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Of stock in trade in partnership name by one partner at the request of his co-partner and of several creditors — Assent of creditors.

See **BILLS OF SALE AND CHATTEL MORTGAGES.**

ATTACHMENT.

See **CONTEMPT OF COURT, 1.**

ATTACHMENT OF DEBTS.

In Division Court.]—See DIVISION COURT, 1.

ATTORNEY AND SOLICITOR.

Retainer by assignee in insolvency.]—See BANKRUPTCY AND INSOLVENCY, 1.

Payment of, by yearly salary.]—See RAILWAYS AND RAILWAY COMPANIES, 4.

Liability of solicitor for registering an instrument which amounted to slander of title.]—See REGISTRY LAWS, 1.

BANKS.

Gift of bank deposit certificate.]—See GIFT, 1.

BANKRUPTCY AND INSOLVENCY.

1. *Solicitor and client—Retainer by assignee under Insolvent Act of 1875—Liability of assignee for costs.*]—The defendant's testator was a sheriff and official assignee under the Insolvent Act of 1875. The plaintiff was solicitor for the City Bank, and also for one B., upon whose petition one G. F. was placed in insolvency. The official assignee became creditor's assignee. At the first meeting of creditors, B. being chairman, the plaintiff, representing the City Bank, whose claim amounted to nearly the whole indebtedness, moved a resolution to sell certain goods of the insolvent, that the assignee should take the necessary proceedings to realize the assets, and recover certain property alleged to belong to the insol-

vent, and for that purpose to retain counsel if necessary. B. became inspector of the estate, and consulted with the plaintiff, and on his advice instructed the assignee to defend and bring actions. The assignee was obliged to pay costs and damages in an action brought against him to recover goods wrongfully taken by him; and he also paid the plaintiff some costs, whereby the assets of the estate were exhausted, and a small sum in addition paid by the assignee out of his own funds. The defendant's testator was subsequently removed from the office of assignee, and a new assignee appointed, whereupon he presented a petition to the Insolvent Court, in which he alleged that he had retained the plaintiff, and had been put to great expense in bringing and defending suits as assignee, and had become liable to pay large sums of money in respect thereof, and prayed payment by the new assignee, which was refused. The plaintiff delivered his bills to the defendant's testator in his lifetime. After the death of the testator the plaintiff wrote a letter to one of his sons about the costs, in which, in relating the facts, he stated that he was attorney for the bank. The plaintiff now sued the personal representative for his unpaid costs of the proceedings carried on by him. Senkler, Co. J., who tried the case, found that the retainer was not a personal one by the assignee, but that the plaintiff had acted for the benefit of the creditors, and was in fact their solicitor.

Held, ARMOUR, J., dissenting, affirming the judgment of Senkler, Co. J., it was a question to be determined on the evidence whether the retainer was a personal one by the assignee, or whether he was acting merely on the instructions of creditors; that

upon the evidence the plaintiff was solicitor for the creditors and not for the assignee personally ; and, notwithstanding the admission contained in the assignee's petition, he had not incurred any personal liability for the costs.

Per ARMOUR, J. The presumption is, that when a solicitor is retained, the person retaining him is liable for the costs, and to avoid liability he must shew some special agreement to the contrary ; and the evidence here not only did not displace the presumption, but shewed that the testator had always considered himself liable for the costs.

Per HAGARTY, C. J. It is the duty of a solicitor to inform his client, when a trustee, as to the advisability of taking proceedings and incurring costs, when it may become a question whether the costs will have to be paid out of his private funds or out of the trust fund or estate. *Butterfield v. Wells*, 168.

2. *Assignment for creditors — Validity of—Trust to pay partnership debts only—Power to pay off liens in full—Change of possession.*]
—W. and W. make an assignment of all their assets, both separate and partnership property, to the plaintiff in trust, to realize and pay "all the just debts of the said creditors of the said debtors ratably and proportionably, and without preference or priority." There was a proviso that the trustee might pay any creditor in full whose debt constituted a lien on any part of the assets, whenever he deemed it advisable so to do. It appeared that one of the partners had no property, and owed but \$110 : that the other had some household furniture which was seized for rent, which it satisfied : that he owed less than \$100 otherwise ; and that all

these separate debts had been satisfied.

Held, CAMERON, J., dissenting, that the assignment was not void in providing for payment of partnership creditors only.

Held, also, that the provision that the trustee might pay off any lien or charge on the assets, did not invalidate the assignment.

Held, also, that there was, under the facts stated below, an actual and continued change of possession. *Kerr v. The Canadian Bank of Commerce*, 652.

3. *Insolvency—Personal earnings of insolvent pending discharge—Maintenance of insolvent—Assignee in insolvency — Parties — Amendment — Costs—32-33 Vic. c. 16—43 Vic. c. 1 (D).*]
—An assignee in insolvency is entitled to all the earnings of an insolvent which are earned after the assignment in insolvency, and before discharge, over and above what is necessary for the reasonable maintenance of the insolvent and his family.

Therefore, where an insolvent, pending his discharge, applied part of his earnings in the purchase of land for the benefit of his wife :

Held, that to the extent of earnings so applied the assignee was entitled to a lien on the land.

Held, also, that the repeal of the Insolvent Acts by 43 Vic. c. 1 (D), before claim made, was no bar thereto, the estate of the insolvent having vested in the assignee before April 1st, 1880, and there having been no reconveyance of the property to the insolvent, who had, however, obtained his discharge before action brought.

Where the original plaintiffs in an action were not entitled to any relief but by amendment, and a party was

added to whom relief was granted :

Held, that the defendants were entitled to costs of the action up to the date of the amendment. *Clarkson et al. v. White et al.*, 663.

4. *Fraudulent preference—Innocent lender.*—If a person borrows money from an innocent lender, and employs it in preferring a creditor, the lender is not debarred from suing for its repayment ; and if he holds security, such as the mortgage from J. and R. to D. in this case, he can charge the money so loaned on such security. *Court v. Holland et al.*, 688.

Action by creditors' assignee to set aside a conveyance as a fraudulent preference.—See FRAUDULENT CONVEYANCE, 1.

Assignment of stock in trade for benefit of creditors by one partner in partnership name—Assent of creditors.—See BILLS OF SALE, AND CHATTEL MORTGAGES, 1.

BAWDY HOUSE.

1. *Keeping house of ill-fame—Evidence*—32 and 33 Vic. ch. 82, D.—*Statutory offence, or at common law.*—On an application to the Divisional Court to quash a conviction made by the Police Magistrate, of the city of Toronto, against the defendant for keeping a house of ill-fame, there being evidence, as set out below, upon which the Magistrate could convict, the Court refused to interfere.

In the conviction the offence was stated to be against the statute in such case made and provided.

Held, that if not constituted an offence under 32 and 33 Vic. ch. 32,

D., the reference to the statute might be treated as surplusage, and the conviction sustained under the common law ; but that the reference to the statute might be supported, because the 17th section imposes a punishment in some respects different from the common law. *Regina v. Flint*, 214.

BILL OF LADING.

Condition against liability after receipt of person applying for the goods.—See CARRIERS, 1.

BILLS AND NOTES.

1. *Promissory note—Stamp Act—Double stamping after repeal of the Stamp Act—Evidence — Onus*—31 Vic. ch. 1, secs. 3, 7—42 Vic. ch. 17, sec. 13—45 Vic. ch. 1.]—Where the defendant, being sued on a promissory note, alleged that the said note was not duly stamped before the repeal of the Stamp Act, nor until after action brought, although he had communicated the fact of that omission to the plaintiffs before he was sued, and the plaintiffs denied that the defendant had so notified them, and alleged that they double-stamped the note as soon as they had knowledge of the omission to stamp, which was not till after action brought, and after the repeal of the Stamp Act ; and the evidence showed that when the note came to the plaintiffs' hands it appeared to be properly stamped :

Held, that the defendant could not be allowed, upon his own unsupported testimony, in such a case, to escape liability. The onus was on him to establish that the stamp was not duly affixed, and that the omission to duly

stamp was so intelligibly communicated to the plaintiffs that it could be said they acquired the knowledge of the defect at the time alleged by him.

To cure a defect in stamping by double stamping forthwith was, under the Stamp Act, 42 Vic., ch. 17, sec. 13, an inherent right existing during the currency of the instrument, and accompanying its possession; and, by virtue of the Interpretation Act, 31 Vic., ch. 1, sec. 3 and sec 7, sub-sec. 36, the same right still exists notwithstanding the repeal of the Stamp Act. *Bank of Ottawa v. McMorro*, 345.

Notes given as collateral security for another's guarantee.—See GUARANTEE AND INDEMNITY, 2.

BILLS OF SALE ACT.

Distress for rent—Seizure of goods subject to chattel mortgage—Liability of tenant to protect chattel mortgage.—See DISTRESS, 1.

1. *Bill of sale—Description of goods—Stock in trade—Assent of creditors.*—In a deed of assignment for the benefit of creditors, goods and chattels were described as all the stock in trade, goods and chattels, &c., including, among other things, all their stock in trade which they, the assignors, "now have in their store and dwelling in the village of Renfrew."

Held, description insufficient, in that the kind of stock in trade should have been mentioned.

The safest course in these cases, in the present uncertain state of the law, is for the assignee to take possession and keep it.

The assignment was executed by

one partner at the request of his co-partner, in the partnership name, and was made at the request of several creditors.

Held, that the assignment was properly executed, and that there was sufficient assent of the creditors. *Nolan v. Donnelly et al.*, 440.

2. *Chattel mortgage—Notice of unrenewed mortgage—Bona fides—Fraudulent preference—Actual advance—R. S. O. ch. 118 and ch. 119.*

—Where two mortgagees, the defendants in this action, took a chattel mortgage to themselves, to secure certain moneys, having at the time knowledge of a pre-existing debt from the mortgagor to T., and of a prior, but unrenewed chattel mortgage to T. to secure the same.

Held, that such conduct did not amount to *mala fides*, and T.'s unrenewed mortgage was void as against them under R. S. O. ch. 119.

Held, also, that inasmuch as the mortgagor was coerced into making the second mortgage, it could not be regarded as a fraudulent preference.

Held, further, that the fact that as to part of the consideration for their mortgage the defendants had not made an actual advance, but were merely liable on promissory notes, did not invalidate the mortgage, R. S. O. ch. 119 not requiring, as does the corresponding English Act, that the consideration should be truly expressed.

It is sufficient if one of several mortgagees makes the affidavit required by R. S. O. ch. 119, sec. 2. *Tidey v. Craib*, 696.

Distress for rent—Seizure of goods subject to chattel mortgage—Liability of tenant to protect chattel mortgage.—See DISTRESS, 1.

Change of possession.—See BANKRUPTCY AND INSOLVENCY, 2.

B. N. A. ACT.

Sec. 92, sub-secs. 13, 14, 16.—See CONSTITUTIONAL LAW, 1.

BUILDINGS.

By-law affecting existing.—See MUNICIPAL CORPORATIONS, 2.

BY-LAW.

Of railway directors fixing salary of solicitor.—See RAILWAYS AND RAILWAY COMPANIES, 4.

Ex parte facto as to fire limits.—See MUNICIPAL CORPORATIONS, 2.

Delegation of powers by municipal authorities.—See MUNICIPAL CORPORATIONS, 3.

For weighing and measuring wood, and delivering in specified waggons.—See MUNICIPAL CORPORATIONS, 4.

CALLS.

How to be made.—See CORPORATIONS, 1.

Action to restrain—Manner of making—Improper calls—Estoppel—Necessity for—Unequal calls.—See CORPORATIONS, 3.

CANADA TEMPERANCE ACT, 1878.

Canada Temperance Act, 1878—Conviction—Certiorari—Prior conviction.—*Held*, CAMERON, J., dis-

sending, that sec. 111 of the Canada Temperance Act, 1878, 41 Vic. ch. 16, D., taking away the right to *certiorari*, applies to convictions for all offences against the preceding sections of the Act, and does not relate merely to offences against sec. 110.

Per HAGARTY, C. J., and ARMOUR, J. An erroneous finding on the evidence by the magistrate, which was all that was shewn here, is not such a want of jurisdiction as warrants the issue of a *certiorari*, and

Per CAMERON, J. There was, on the facts set out below, no evidence of the commission of the offence charged in this case, and therefore the magistrate acted without jurisdiction, and a *certiorari* would lie.

Per ARMOUR, J. The omission of the magistrate to ask the accused whether he had been previously convicted did not deprive him of jurisdiction to receive proof of the prior conviction. *Regina v. Wallace*, 127.

CARRIERS.

1. *Carrier—Bill of lading—Condition against liability for negligence—Construction of—Judgment against three defendants—Separate appeals to Court of Appeal and Divisional Court.*—The plaintiff, consignor, consigned butter to his co-plaintiffs, consignees, in England, and shipped it by the defendant companies under a contract with the defendant Despatch Company, on through bills of lading, making it deliverable to order or assigns, and endorsed by the plaintiff to his co-plaintiffs, his vendees, in England, at a through rate paid to the Despatch Company, and apportioned amongst them and the two other defendant companies by agreement. The butter was carried by the defen-

dants, the Great Western Railway Company, from London, Ontario, to New York, and there delivered in good condition on a barge belonging to the defendants, the Great Western Steamship Company. It remained on the barge through the negligence of the latter company for some days during very hot weather, whereby it was damaged, and it was in that condition received by the consignees. By clause 8 of the bill of lading it was stipulated that "the consignees, or party applying for the goods, are to see that they get their right marks and numbers, and after the lighter-man, or wharfinger, or party applying for the goods, has signed for the same, the ship is to be discharged from all responsibility for mis-delivery or non-delivery, and from all claims under this bill of lading." Osler, J., who tried the case, found in favour of the plaintiff, and gave a general verdict against all the defendants.

Held, per HAGARTY, C. J., affirming the decision of Osler, J., that the condition on the bill of lading should, notwithstanding the general words at the conclusion, be restricted in its application to cases arising from mis-delivery or non-delivery, and did not relieve the defendants, the steamship company, from liability for actual negligence, but that the railway company were not liable.

Per CAMERON, J. The condition in the bill of lading, by its concluding general terms, absolved the defendants from liability for the negligence complained of.

It appeared that the Despatch Company had given notice of appeal to the Court of Appeal from the decision of Osler, J., before the other defendants appealed to this Court. *Per* ARMOUR, J. Where there is a

general judgment against several defendants Rule 510 does not permit them to sever and appeal to different Courts, but they were all bound to appeal to the tribunal to which the defendant taking the first step had appealed, and on this ground, the appeal should be dismissed. *Hately et al v. Merchants' Despatch Company et al.*, 723.

CERTIORARI.

In cases of convictions under the Canada Temperance Act, 1878.—*See* CANADA TEMPERANCE ACT, 1878.

CHANGE OF VENUE.

See VENUE, 1.

CHURCHES.

1. *Demurrer for want of parties—Churchwardens—Incumbent—Church Temporalities Act—3 Vic. ch. 74—Rule 189.*—Where a testator bequeathed unto the incumbent of a certain church all the property she might die possessed of, to be used for the relief of the poor of the church, to be dispensed by the said incumbent, and the Churchwardens brought an action, on behalf of themselves and all the members of the congregation, against the executors, to have the estate administered, and for a declaration that the incumbent was entitled to distribute the fund, and an order for payment over of all such sums as should have been distributed by the incumbent among the poor of the church.

Held, on demurrer to the statement of claim, that it was bad in substance, for the churchwardens had no title

to maintain the action, since they could not be said to represent the incumbent, to whom the bequest was made, and who was not a member of the congregation in the same sense as the plaintiffs and the other members, and sec. 6 of the Church Temporalities Act, 3 Vic. c. 74, did not authorize them to sue.

Semble, that the said section gives churchwardens authority in certain specified matters, in which *all* the members of the church are interested, but here the bequest was only to a particular class, viz., the poor of the church, and therefore not within the section.

Clowes v. Hilliard, L.R., 4 Ch. D. 413, and *New Westminster Brewing Co. v. Hannah*, 24 W.R. 899 followed, and *Werderman v. Société Générale d'Electricité*, L.R. 19 Ch. D. 246 distinguished. *McClenaghan v. Grey*, 329.

CHURCHWARDENS.

See CHURCHES, 1.

COLLATERAL SECURITY.

Mortgage to secure running account.]—*See* MORTGAGE, 1.

COLLECTOR.

See ASSESSMENT AND TAXES, 2.

COMMISSION.

Allowance of, to collector of taxes.]—*See* ASSESSMENT AND TAXES, 2.

COMMISSION MERCHANTS.

1. *Factor*—*Power to sell for repayment of advances without special*

authorisation—Irrevocable power—Power to sell by auction.]—S., a manufacturer, desiring to borrow money from M., agreed with M. in writing, that M. should have the selling of the goods manufactured at his, S's, factory; that S. should give M. a mortgage on the factory, and premises to secure \$5000, and interest, to be advanced by M., and should furnish to M. all the goods manufactured at the factory, and manufacture the same to the satisfaction of M., and ship the same to M., as M. directed, at such times, and in such reasonable quantities as he from time to time should direct, and should pay M. a *del credere* commission of seven and a half per cent. for selling the same, and interest at eight per cent. on all moneys advanced by M. over the \$5000; and M. covenanted, as his orders were filled, and the goods received, to advance in cash to S. seventy-five per cent. of the wholesale trade value of such goods, and for that purpose the said goods were to be invoiced to M. at such value that he, M., could sell them to the best advantage. It was agreed, also, that all goods manufactured at the factory shall be sold only by or through M.

Held, that the above agreement constituted M. a factor, not a pledgee, for he had power to sell without regard to any default in payment, in the ordinary course of trade.

Held, also, that M.'s authority to sell was irrevocable.

Held, further, that under the interest which M. had in the goods, and from the nature of the dealings, and arrangements of S., and M., if S. did not repay the advances made to him, or did not deliver to M. goods sufficient to keep his advances protected by a surplus of twenty-five

per cent. of goods at the wholesale trade value, and it became necessary for M. to protect himself against such default, and he could not within a reasonable time have sold to customers, he could sell by auction, and was not bound to delay until private sales could be made.

It appeared that certain goods not specially ordered by the plaintiff, were sent to him by the defendant on some arrangement, on which he advanced seventy-five per cent., and which goods were sold by him in the same manner as goods sent to fill his orders.

Held, that he had the same right to sell these goods as the goods received under the written agreement. *Mitchell v. Sykes*, 501.

CONSTITUTIONAL LAW.

1. *Constitutional law — Taking evidence in this province to be used in foreign tribunals*—*B. N. A. Act sec. 92, sub-secs. 13, 14, 16—31 Vic. ch. 76 (D.)*].—*Held*, that the Act 31 Vic. 76 (D.) is not *ultra vires* the Dominion Parliament, for the taking of evidence in one of the provinces for use in foreign tribunals is not a subject which is assigned to the exclusive legislative authority of the Province by sec. 92 of the British North America Act, inasmuch as such proceedings are of extra-provincial pertinence, and do not relate to civil rights in the Province. *Re Wetherell and Jones*, 713.

CONTEMPT OF COURT.

1. *Contempt of Court—Newspaper articles—In pari delictu.*].—On an application on behalf of the respondent H. to an election petition, for

an order *nisi* calling on the defendant, his opponent at the election, to shew cause why he should not be committed for contempt of Court for publishing articles in his newspaper, reflecting on and prejudging the conduct of the respondent and the returning officer during the currency of an election petition.

Held, on the materials before the Court, a *prima facie* case of contempt was made out ; but as it appeared on the same materials that the respondent had attended and spoken at a meeting held for the purpose of approving of the conduct of the returning officer, and presenting him with a gold watch as a mark of such public approval, the applicant was also in fault, and the motion was refused. *In re Bothwell Election Case*, 224.

In disobeying injunction.].—*See* INJUNCTION, 2.

CONTRIBUTORY NEGLIGENCE.

Jumping off train in motion.].—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

CONVICTION.

The allegation in a conviction that the offence was committed between the 30th of June, and the 31st of July :

Held, a sufficiently certain statement of the time. *Regina v. Wallace*, 127.

For gambling.].—*See* GAMBLING, 1.

Second conviction for same offence.].—*See* JUSTICES OF THE PEACE, 1

See BAWDY HOUSE, 1.

CORPORATIONS.

1. *Corporations—Calls—Resolutions—By-laws—Notice—Stockholder—Head office, change of.*—Action to recover calls on stock.

The defendant's act of incorporation enabled the directors to make calls at such times as they might deem requisite, provided that successive calls should be made at intervals of not less than two months between such calls, that no call should exceed ten per cent., and that thirty days' notice should be given of every such call.

Held, not necessary that the calls should be made by by-law, but that a resolution was sufficient, and that the resolution need not name the place of payment of the calls, but that this could be done in the notice.

A resolution was passed by which a call was made of 10 per cent., payable on the 1st March, and it was thereby further resolved that a further call of 10 per cent. be made payable on 1st September.

Held, clearly not a call of 20 per cent. but two calls of 10 per cent. each; and that the fact of the second call being illegal did not invalidate the first call, because contained in the same resolution.

The Act provided that the head office of the company might be changed to such other place as might be determined by the shareholders at any one of the general meetings.

At the general annual meeting a resolution was passed authorizing the directors to consummate arrangements for the removal of the head office from Ottawa to Toronto. The directors made the change, and the subsequent annual meetings were held at Toronto, at the first of which so held, the by-law referring to the place of holding

the annual meetings was amended by substituting Toronto for Ottawa.

Held, that the change was effectually made.

An alleged third call was objected to as being a fourth call, in that the illegal call before referred to had been abandoned; but,

Held, that the evidence clearly shewed such abandonment.

One of the calls was made by resolution of the 3rd August, payable on the 6th September, and notice of it was mailed at Toronto on the 5th August, addressed to defendants at Ottawa, but not received until the 8th.

Held, sufficient, following *Union Fire Ins. Co. v. Fitzsimmons*, 32 O. P. 602.

In addition to fifty shares personally subscribed by the defendants O. and S. and upon which they were held liable, the plaintiffs claimed that they were holders, respectively, of 75 and 60 shares, for which they had not subscribed.

Held, on the evidence, set out in the report of this case, that O. was not such holder, but that S. was, and was therefore liable thereon. *The Union Fire Ins. Co. v. O'Gara*, 359.

2. *Friendly society—Insurance—Suspended Court—R. S. O. ch. 167, sec. 11—Amendment—Pleading.*—

O. was a member of Court Maple of the defendants' order, and was insured under the endowment provisions thereof for \$1000. This Court left the order in a body and joined another order of Foresters, and it was in consequence suspended. On joining the new order it was arranged that O., who was in ill health and had gone to California for change, should be taken and insured with the others. By the rules of defendant's order members of sus-

pendent Courts in good standing at suspension were, on application within thirty days to the supreme secretary, and payment of a fee of \$1, to receive a card of membership and be entitled to the endowment, provided they paid all assessments as they fell due, and affiliated with another lodge of the order; but, if after thirty days, they must pass a medical examination. O., on his return from California, on ascertaining that Court Maple had been suspended, within the thirty days, being then in good standing, applied to the defendants supreme secretary for his card of membership, tendering \$1 and assessments due, which was refused on the ground that a medical certificate was necessary. O., by reason of his not having the card, was prevented from affiliating, though he endeavoured to do so, with another Court. By the endowment certificate the \$1000 was payable to the widow, orphans, or legal heirs of O., and by endorsement thereon O. directed the amount to be paid to the plaintiff, the widow.

Held, that under the directions so given, as well as under R. S. O. ch. 167, sec 11, the widow was entitled to recover the amount; and that the fact of O. being a member of another order did not *ipso facto* deprive him of his rights and membership of defendants' order.

At the trial an amendment was asked, to set up a forfeiture of the policy by reason of O. having gone to California without a permit, which was refused by the judge.

Held, under the circumstances the refusal was proper.

Quere, whether the way, cause, and manner in and for which O. and the other members of Court Maple left it and joined in a body another order might not, if properly pleaded, have required some consideration.

The frame and effect of the pleadings in this case considered. *Oates v. The Supreme Court of the Independent Order of Foresters*, 535.

3. *Company — Parol evidence — Written agreement — Estoppel — General meeting — Co-plaintiffs — Action to restrain calls — Directors — Purchase of stock by directors — Fiduciary position of directors — Ratification of allotment of shares — Exclusion of votes — Power of majority — Necessity for calls — Jurisdiction — Unfair discrimination — Notice of business — Parties — R. S. O. ch. 150 secs. 37, 41.*

— Where certain shareholders of the G. L. Company sought to restrain a call on stock, on the ground that it was being made in contravention of the terms of a certain unwritten agreement alleged to have been entered into between all the promoters, when the G. L. Company was formed.

Held, that evidence of such agreement was inadmissible, since it was contradictory of the written agreement entered into by the plaintiffs when subscribing for their shares, viz., to take stock, and pay the calls when duly made.

Where a by-law making a call on stock was confirmed at a general meeting of shareholders, purporting to be the annual meeting, but not held on the proper day for such annual meeting, as prescribed by the by-laws of the company.

Held, that one who, as a director, had seconded a resolution of the directorate that the meeting should be held on the day it was held on, was estopped from objecting to the call on this ground, and so, therefore, were all those who were co-plaintiffs with him in an action to restrain the said call.

Held, also, that under R. S. O. ch. 150, secs. 37, 41, a shareholder, who

is in arrear for unpaid calls, is absolutely debarred from voting at a shareholders' meeting, and in any subsequent action by him to restrain a call, the by-law for which was ratified at such a meeting, on the ground that his vote was wrongfully excluded, the above objection can be taken advantage of by the company, though that was not the ground assigned at the time for excluding the vote.

Where shareholders have assisted in making, and approved of calls, they cannot afterwards object that the calls were improperly made.

In the absence of agreement, there is clearly no duty or obligation on the part of directors to pledge their own credit for the benefit of the company.

Where certain shares were allotted to one of the directors of a company at par, in consideration of which he offered to supply funds to meet a pressing demand upon the company, and he voted on these shares at a general meeting of the shareholders, and no opposition was at the time made to his so doing.

Held, that the shareholders must be considered to have ratified the transfer, and could not afterwards object to it as improper.

It was alleged that he thus acquired such stock in order to obtain control of the company.

Semble, that this would not be improper, if no improper means were used by him; but that had he made a profit thereby, the company might perhaps have claimed it.

An allotment of shares to a director, if a questionable act, may be ratified by the company, and for this purpose, as for all other acts within the power of the corporation, the approval of a majority of shareholders is sufficient.

Where a call is made upon all stockholders without discrimination,

or partiality, the Court will never interfere to determine whether it was necessary, or not.

Semble, however, that if calls were made in such a way as to favour one set of stockholders, and impose an unequal burden upon others, an equity might, perhaps, be found for interference.

When on May 31st, 1880, the directors of a company passed a by-law reducing the number of the directorate from five to three, and this was confirmed at an adjourned general meeting of shareholders on June 1st, 1880, and a new board of three forthwith appointed, but, it appeared, no notice had been given either before the original, or the adjourned meeting of the intention of making any such change in the directorate.

Held, that the appointment of the new board was not a legal one, and a resolution by them to forfeit stock for non-payment of calls was invalid, and the forfeiture must be restrained.

Held, also, that the company were properly made parties to an action to restrain such forfeiture, the reduction of the directorate to a board of three being its act. *Christopher et al. v. Noxon et al.*, 672.

Power of railway directors to appoint and pay officers and servants.—See RAILWAYS AND RAILWAY COMPANIES, 4.

Municipal.—See MUNICIPAL CORPORATIONS.

COSTS.

Of arbitration proceedings on reference.—See ARBITRATION AND AWARD, 1.

Of arbitration where order of reference is silent as to them.—See ARBITRATION AND AWARD, 1.

Up to date of amendment made.]—
See BANKRUPTCY AND INSOLVENCY, 3.

Mortgagor and Mortgagee—Accounting.]—See MORTGAGE, 2.

COUNTY COURT JURISDICTION.

Investigating accounts beyond the pecuniary jurisdiction of the County Court as between a defendant and third party.]—See THIRD PARTY, 1.

CRIMINAL LAW.

1. *Forgery in respect of illicit alterations of books of account.]—See EXTRADITION, 1.*

See LOTTERY.

DAMAGES.

Mortgage given to secure against damages.]—See MUNICIPAL CORPORATIONS, 1.

DEED.

Obtaining signature to bond by fraud.]—See EVIDENCE, 1.

Grant of way—Short form.]—See WAY, 1.

DEFAMATION.

Slander of title.]—See REGISTRY LAWS, 1.

DELEGATION.

Of powers by health officers.]—See MUNICIPAL CORPORATIONS, 3.

DEMURRER.

For want of parties.]—See CHURCHES, 1.

DESCRIPTION OF GOODS.

In bills of sale and chattel mortgages.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

DISTRESS.

1. *Distress for rent—Seizure of goods subject to chattel mortgage—Liability of tenant to protect chattel mortgage.]—B. leased certain premises to Y., who assigned the lease to P., and sold to him the goods on the premises subject to a chattel mortgage to the plaintiff and others. P. gave a chattel mortgage to the plaintiff and others upon these goods to secure to them the purchase money thereof. On 1st February the defendant took possession of the premises under a verbal agreement with P., that the latter should assign the lease to him, and it was so assigned on 4th June following. There was no evidence as to what bargain there was between P. and the defendant as to the goods, but the goods remained on the premises without the request of the defendant. The plaintiff and his co-mortgagees subsequently took possession of the goods under their chattel mortgage; but on the same day, before they were removed, the landlord seized them for rent, a portion of which was due before defendant took possession. Upon the promise of the plaintiff to pay the rent the landlord withdrew. The plaintiff having refused to keep his promise by paying the rent, the landlord brought an action against him and compelled*

payment. The plaintiff now sued the defendant to recover the amount so paid.

Held, that, there being no privity of contract or estate between the defendant and the plaintiff, and the goods not having been originally placed in the premises at the tenant's request, and having in fact been in the possession of the plaintiff when seized, the defendant was not bound to protect them against seizure for rent, which he was not shewn to have been liable for: that the plaintiff's payment therefore was voluntary, so far as concerned the defendant, and and he could not recover. *Herring v. Wilson*, 607.

DIVISION COURT.

1. *Division Courts Act—Garnishee proceedings—Notice disputing jurisdiction filed too late—Prohibition—High Court procedure.*—*Held*, affirming the judgment of ARMOUR, J., that where a garnishee does not file a notice disputing the jurisdiction of a Division Court within the time required by 43 Vic. ch. 8, sec. 14, O., though no objection can be taken to this jurisdiction of the Division Court in that Court, the jurisdiction of the High Court of Justice to prohibit the proceedings is not ousted.

The garnishees, though partners, resided in different places out of the jurisdiction of the Division Court, and but one of them was served. No order was made dispeusing with service on the other. The learned Division Court Judge gave judgment against both in their absence.

Per ARMOUR, J. The prohibition might be supported on this ground also. R. S. O. ch. 47, sec. 134 construed.

The Judicature Act does not apply to a case of this kind, the proceedings of which are specially provided for in the Division Courts Act. *Clarke v. Macdonald, Flatt and Bradley, Garnishees*, 310.

2. *Division Courts—Claim for damages and debt—Damages above jurisdiction—General abandonment—Prohibition.*—The plaintiff sued in the Division Court on a claim which was originally composed of a solicitor's bill of costs, \$36.06; damages, \$69.33; due for advice, \$6; total, \$111.39. The plaintiff abandoned as to \$11.39, without specifying from what items he threw the amount off. The plaintiff, at the trial, agreed to take \$30 for the first item, and the learned Judge reduced the \$69.33 to \$62, the \$6 item was struck out, and the total then stood \$92.33. This sum was further reduced to \$80, for which judgment was entered.

Held, affirming the judgment of Wilson, C. J., that prohibition was properly directed; that the abandonment being general, it could not be assumed that the plaintiff had made a reduction in his demand for damages, so as to give the Court jurisdiction; and even if the Court had power to confine the prohibition to the claim for damages, it could not be done here, for it did not appear how much of the \$80 was applicable to such a claim.

The nature of the claim, as appearing on the summons, is the claim recognisable on a motion for prohibition.. *Meek v. Scobell*, 553.

DONATIO MORTIS CAUSA.

Of bank deposit certificate.—*See* GIFT, 1.

DOWER.

1. *Dower act—Damages for detention—Damages for mesne profits—Tout temps prist—R. S. O. c. 55, ss. 10, 20, 23, 25—O. J. A. s. 17, sub-s 10—ib. 16, sub-s. 3.*—R. brought an action for dower against F., the tenant of the freehold, who claimed title through the devise of her husband, and endorsed her writ with a claim for damages for detention of dower. F. appeared and admitted his tenancy, and R.'s right to dower:

Held, that R. might, nevertheless, go on and recover damages for the detention from and after demand for dower made by her on F.

Held, also, that R. S. O. c. 55 has not taken away or diminished the right of a dowress to damages as well for mesne profits, as for detention, against all persons and in all cases where they were recoverable before August 10th, 1850.

Held, further, that at all events, since O. J. A. s. 17, sub-s 10 a tenant of the freehold claiming, as in this case, may plead that he has at all times, since he became such tenant, been ready and willing to render the plaintiff her dower, and if the plaintiff desires to avoid that plea she should reply a demand and refusal.

Quære, whether if such demand and refusal be pleaded and proved, damages can be computed against such a tenant from the death of the husband or only from the date of the plaintiff's demand for dower. *Ryan v. Fish et al.*, 335.

Time for moving against report in action of.—See NEW TRIAL, 1.

EASEMENT.

Right of way—Way of necessity.—See WAY, 1.

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ELECTION.

Contempt of Court in respect of election petition.—See CONTEMPT OF COURT, 1.

Agent for sale of crown lands.—See PARLIAMENT, 1.

ESTATE.

Tenant for life, liability of for waste.—See WILL, 2.

ESTOPPEL.

Estoppel of married woman.—See HUSBAND AND WIFE, 1.

See LIMITATIONS OF ACTIONS AND SUITS, 1.

Offer to purchase bar to setting up title by possession—Becoming security to one in supporting his title bar to setting up title by possession as against him through whom the former claims.—See LIMITATIONS, STATUTE OF, 2.

EVIDENCE.

1. *Evidence—Collateral matters—Admissibility of—Pleading—Admissions by non-denial.*—In an action on a bond against two sureties, the defendant R. set up the defence and gave evidence that his signature to the bond had been obtained by fraud. The evidence of his co-defendant, C., was tendered for the purpose of shewing that C.'s signature to the bond had also been so obtained, which was rejected as inadmissible.

Held, that the evidence of C. was admissible as shewing a fraud practised on him, with respect to the same instrument by the same person, and

at or about the same time as the alleged fraud on R., and because it was confirmatory of R.'s evidence; and a new trial was ordered. *The Waterloo Mutual Insurance Company v. Robinson and Clark*, 295.

Taking evidence in this province for use in foreign tribunals.]—See CONSTITUTIONAL LAW, 1.

3. *Parol evidence to vary written agreement as to subscribing for shares*]—See CORPORATIONS, 3.

4. *Of matters sufficient to revive a claim barred by the Statute of Limitations.*]—See LIMITATION OF ACTIONS AND SUITS, 1.

5. *Proof of foreign law.*]—See GAMBLING, 2.

See ASSESSMENT AND TAXES, 2.

EXECUTION.

1. *Fi. fa. goods—Delivery to sheriff—Sale by execution debtor thereafter—Right of sheriff to goods—Abandonment.*]—A sheriff received two executions against one M.'s goods, on the 18th January, and 15th February, respectively. He made a formal seizure on the delivery of the first writ, but left no one in possession, and the execution debtor remained in possession, and carried on his business as before the seizure. There had been a stay on this writ by the solicitor for the execution creditor, but on the delivery of the second writ the sheriff was directed to proceed on both. On the 6th March, the goods, consisting of the whole of the execution debtor's stock-in-trade, were sold by the execution debtor to the plaintiffs, who removed them to

their own place of business. On 22nd March, the sheriff seized all the goods then in the plaintiffs' possession, which he had received from the execution debtor, as also certain goods of the plaintiffs which he claimed to take in lieu of goods received from the execution debtor and sold by plaintiffs. The sale to the plaintiffs was found to be *bonâ fide*, and for value, and without notice of the executions. In replevin for the goods.

Held, WILSON, C.J., dissenting, that the sheriff was entitled to the goods of the execution debtor then in the plaintiffs' possession; but not to the goods taken by the sheriff in lieu of those sold by the plaintiffs: that there was no abandonment of the executions, nor any such conduct on the part of the sheriff or the execution creditor as to estop them from asserting that the executions were in force.

On the sheriff making his seizure on the 22nd March, the plaintiff gave him an undertaking to answer for all goods sold by him thereafter, if the sheriff should be held entitled to the goods.

Held, under a counter-claim setting up this understanding the sheriff was entitled to recover the value of the goods sold by the plaintiffs after the 22nd March, and before the issue of the writ of replevin. *Patterson et al. v. McKellar, Sheriff*, 407.

EXECUTORS AND ADMINISTRATORS.

Compensation to—Bequest of share in residue to.]—See WILLS, 1.

Action against administrator for fraud of deceased—Partnership.]—See FRAUD, 1.

EXPROPRIATION.

By railway of land containing minerals—For collateral object.]—See RAILWAYS AND RAILWAY COMPANIES, 5.

EXTRADITION

1. *Extradition—Public book—Evidence—Alteration—Forgery—Extradition Act, 1877, 40 Vic ch. 25, D.]—*The prisoner, who was collector of the County of Middlesex, in the State of New Jersey, kept a book in which to enter the payment and receipts of all moneys received by him as such collector, and which was the principal book of account kept by him. The book was purchased with the money of the county, and was kept in the collector's office, and was left by him at the close of his term of office; it was by statute open to the inspection of those interested in it, and contained the certificate of the county auditors as to the correctness of the matters therein contained.

Held, that the book was the public property of the county, and not the private property of the prisoner.

After the book had been examined by the proper auditors as to the amounts received and paid out by and through the prisoner as such collector, and a certificate of the same made by them, the prisoner, who was a defaulter, with intent to cover up his defalcation, altered the book by making certain false entries therein of moneys received and paid out, and changing the additions to correspond. Some of these entries were by the prisoner himself, and others by his clerk under his direction, but the clerk on finding that such entries were false changed them back.

Held, that this constituted forgery at common law, as well as under our statute 32-33 Vict. ch. 19, D.

Held, also, that under the Extradition Act of 1877, 40 Vict. ch. 25, D., it is essential that the offence charged should be such as if committed here would be an offence against the laws of this country. The offence, however, was also proved to be forgery by the laws of New Jersey.]—*In re Jarrard*, 265.

FACTOR.

As distinguished from a pledgee.]—See COMMISSION MERCHANTS, 1.

FARM-CROSSING.

Railway farm-crossings.]—See RAILWAYS AND RAILWAY COMPANIES, 1.

FIERI FACIAS.

Abandonment by sheriff of goods seized under.]—See EXECUTION, 1.

FIRE LIMITS.

By-law as to.]—See MUNICIPAL CORPORATIONS, 2.

FOREIGN GUARDIAN.

Payment of infant's legacies.]—See INFANT, 2.

FORESTERS.

Action against Independent Order of Foresters for recovery of endowment money.]—See CORPORATIONS, 2.

FORFEITURE.

For illegal voting at provincial elections.—See PARLIAMENT, 1.

Relief against forfeiture.—See MUNICIPAL CORPORATIONS 1.

FORGERY.

In respect of alteration of books of account.—See EXTRADITION, 1.

FRAUD.

1. *Fraud and misrepresentation—Personal representatives.*—G. having dissolved partnership with M., by the terms of the dissolution held certain land subject to a lien of \$255, to be paid by M. M. then arranged a sale to C. for \$2250, intending to defraud any company who would lend \$1125, on the security of the land (it being really worth about \$600), and drew up a receipt for \$1150, representing that sum as being part payment of the consideration money, which G. signed. G. subsequently executed a conveyance with \$2250 inserted as the consideration, and deposited it with his solicitor as an *escrow*, to be delivered up on payment of his \$525 lien. It appeared G. had since died, and S. was appointed his administrator. M. and C. by means of an overvaluation and certain misrepresentations, one of which was the production of G.'s receipt, obtained a loan of \$1125 from the plaintiffs to C., and out of the proceeds paid S. the \$525, and took up the deed.

At the trial it was shown that the plaintiffs were aware of the death of G. before they acted on or even

knew of the existence of his receipt, and that S. knew nothing of the transaction except that he was entitled to the lien for \$525.

Held, (reversing the judgment of PROUDFOOT, J.,) that the plaintiffs could not recover against S. as representative of G., for no cause of action existed against G. at the time of his death, and S. had done no wrong.

In the absence of fiduciary relationship no recovery can be had against the representatives of a deceased person who is charged with fraud unless profit has accrued to the wrongdoer's estate. *Hamilton Provident and Loan Society v. Cornell*, 623.

Confirmatory evidence of.—See EVIDENCE, 1.

FRAUDULENT CONVEYANCE.

1. *Fraudulent preference—Debtor and creditor—Parties—Demurrer—R. S. O. ch. 95, sec. 13.*—A creditor's assignee, not himself a creditor, cannot sustain an action to set aside a fraudulent conveyance or transfer made by the debtor, prior to the assignment under which he claims to be such assignee. *Lumsden v. Scott*, 323.

Fraudulent preference—Pressure.—See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

FRIENDLY SOCIETIES.

See CORPORATIONS, 2.

GAMBLING.

1. *Gambling—Playing at Pharaoh—Conviction—Civil action—* 12 Geo. II. ch. 28-27 Geo. III. ch. 1, sec. 2.]

—The defendant was convicted by the Police Magistrate of the City of Toronto for playing at a game of cards called Pharaoh, contrary to the statute 12 Geo. II. ch. 28, and sentenced to pay £50 sterling, the penalty thereby imposed.

Held, that under 27 Geo. III. ch. 1, sec. 2. the jurisdiction of Justices of the Peace in such cases was taken away, and in lieu thereof the recovery of such penalty was to be by civil action.

The conviction was therefore quashed.

Semble, per WILSON, C. J., that the defendant could have been convicted under the Municipal Act, 46 Vic. ch. 18, sec. 49, sub-sec. 33, against gambling, and the by-law passed with reference thereto. *Regina v. Matheson*, 559.

2. *Principal and agent—Gambling contract—“Options”—“Differences”—Onus of proof—Proof of foreign law.*] — Defendants, Toronto merchants, engaged plaintiffs, Chicago brokers, to buy and sell grain in Chicago on margin, which the latter did, advancing them money, for which they sued. Defendants having refused to settle for losses sustained.

Held, reversing the judgment of Patterson, J. A., that assuming the State law to be that if the contract was to deal in such a way that only the differences in prices should be settled according to the rise and fall of the market, and no grain be either delivered or accepted, the contract would be a gambling contract and illegal, it lay upon defendants to establish clearly that such was the

character of the dealing and this defence not having been clearly proved, judgment was given for the plaintiffs.

After judgment, at the trial, but before the argument *in banc*, the defendants put in the report of the case bearing upon the question, decided in the Supreme Court of the U. S., verified by affidavit: *Held*, admissible.

Where the opinions of experts on foreign law are conflicting, the Court will examine for itself the decisions and text books of the foreign country, in order to arrive at a satisfactory conclusion. *Rice et al v. Gunn et al.*, 579.

See LOTTERY, 1.

GARNISHMENT.

In Division Court.]—See DIVISION COURT, 1.

GIFT.

1. *Deposit receipt—Gift by husband to wife.*]—One J. O'B., and B. O'B., his wife, were the holders of a certain deposit certificate of the Bank of British North America to the following purport: “Received from J. O'B. and B. O'B. the sum of \$2,800, for which we are accountable to either, with interest at current rate,” &c. Three or four days before his death, J. O'B. called his wife to his bedside, and in the presence of P., gave the certificate to her, saying she was to keep it for her own use, and unequivocally expressing an intention to make an absolute gift of the money to her.

Held, J. O'B. having died, that his wife was entitled to the money in the bank. *O'Brien v. O'Brien et al.*, 450.

GUARANTEE AND INDEMNITY.

1. *Principal and surety—Promise in writing—Sufficiency of.*—F. being indebted to the plaintiffs, who were pressing him for payment, the defendant signed the following document and delivered it to the plaintiffs in consideration of their giving time to F.: "I will guarantee that the security offered by Mr. John Fleming for the balance of your account will be executed and forwarded within ten days." The security referred to was a mortgage upon real estate to be executed, and a paid-up life policy for \$5,009, which F. had agreed verbally to give to the plaintiffs, neither of which existed at the time of F.'s agreement or the defendant's guaranty. F. never gave the security, and the plaintiffs, by refraining from suing him, lost their debt.

Held, affirming the judgment of Burton, J. A., HAGARTY, C. J., dissenting, that the writing signed by the defendant was not sufficient to satisfy the fourth section of the Statute of Frauds, whether regarded as an original promise or a guaranty.

Per HAGARTY, C. J. The guaranty is not divisible. The writing was not sufficient as to the mortgage of real estate, because the promise of the debtor himself was not enforceable against him, not being in writing; but as to the policy the writing was sufficient. *Lightbound and Warnock*, 187.

2. *Guarantee—Promissory note.*—On June 11th, 1877, defendant wrote to the plaintiff that J. S., the person he wished to assist, "informs me now that I could help him by pledging myself to you that you might give him a letter of credit in Montreal, and now I say, if you will

assist him in that way to \$7000 or \$8000, that I will become responsible to you for the like amount in any manner you may wish, &c." J. S. then applied to the plaintiff, who gave a continuing guarantee in his favour to some Montreal merchants, dated August 28th, for goods to the extent of \$5000, for three years. At the same time the following note, signed by the defendant in blank, was filled up by J. S.: "Three years after date I promise to pay to the order of J. S. \$5000, &c." "Value received." To which was added, "This note is given as collateral security for a guarantee of \$5000 given to J. S. by A. S.," the plaintiff. No notice was ever given to defendant of the plaintiff's guarantee, or of the form in which the note was filled in. In an action on the defendant's letter as a continuing guarantee; and on the note.

Per WILSON, C. J.—The letter was a guarantee, but not a continuing one, and there could be no recovery under it, as the evidence shewed that the amount of \$5000 secured thereby had been paid.

Per GALT, J., agreeing with the judgment of BURTON, J. A., at the trial, it was not a guarantee, but merely a proposition leading up to a guarantee; at all events if a guarantee it was not a continuing one.

Held, also, that the note was not a negotiable promissory note, not being made payable absolutely and at all events, but only as collateral security for plaintiff's guarantee. *Sutherland v. Patterson*, 565.

GUARDIAN.

Foreign guardian—Payment of infants' legacies to.—See INFANTS, 2.

HUSBAND AND WIFE.

1. *Deficiency from false survey—Compensation—Trusts declared of original lot—Disclaimer by cestui que trust—Improvements under mistake of title—Estoppel of married woman—Restraint against anticipation.*—G. W. F., being the patentee of a certain lot described as of 200 acres, but in which there was a deficiency, conveyed half of the lot to J. B. P., who conveyed it to trustees, to hold in trust for E. F., wife of G. W. F., upon certain trusts declared in the deed, and without power to her to anticipate. The deficiency was subsequently discovered, and upon the application to the government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land, as compensation for the deficiency was made to the trustees of E. F., describing them as such. Subsequently an instrument under seal, expressed to be made between J. B. P., of the first part, and E. F., wife of G. W. F., of the second part, and the trustees of the third part, which recited the facts and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. and E. F., whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the trustees held them as trustees for G. W. F., the patentee of the original lot. After this the trustees, by the direction of G. W. F. conveyed to E., under whom the defendants claimed. E. F. now brought this action to recover the land.

Held. [HAGARTY, C.J., dissenting,] that E. and those claiming under him must be held to have had notice

of the title of the trustees, who were described in the patent as trustees of E. F.: that this land was subject to the trusts of the previous conveyance to them: that E. F. was not estopped by the declaration executed by J. B. P. and herself, which did not divest her of her title, and that therefore she was entitled to recover.

Held. also, that there should be a reference to the Master to take an account of taxes paid and permanent improvements made upon the lands, further consideration being reserved.

Per HAGARTY, C.J. — The legal estate being in the defendant by conveyance from the trustees, the plaintiff should show an equity to recover what she claimed as part of the trust estate, which she had not done; that the patent to the trustees, though describing them as such, did not in terms declare any trust respecting this land, and it could not be assumed that it formed part of the trust premises.

Per ARMOUR, J. — The case was not within R.S.O. ch. 95, sec. 4, as to improvements under a mistake of title, but was governed by the principles of equity governing the relationship of trustee and *cestui que trust*.

Per CAMERON, J. — The case was within the Statute. *Foot v. Rue*, 94.

Gift by husband to wife of bank deposit certificate.—See GIFT, 1.

ILLEGALITY.

Of option sale.—See GAMBLING, 2.

Innocent loan of money subsequently employed by borrower in a fraudulent preference.—See BANKRUPTCY AND INSOLVENCY, 4.

IMPROVEMENTS.

Improvements under mistake of title.]—See HUSBAND AND WIFE, 1.

INFANT.

1. *Mortgage by infant—Confirmation of voidable instrument—Acquiescence—Laches—Presumption of knowledge of legal rights.*]—The plaintiff being at the time an infant, on February 20th, 1878, executed a mortgage in favour of the defendants. The proceeds were chiefly applied in paying off prior incumbrances on the land. The plaintiff came of age on April 19th, 1880. After this date, and with full knowledge of his position, he, on January 10th, 1884, executed another mortgage, with the object of in part paying off the mortgage in question; and, moreover, by certain conversation with an agent of the defendants, he admitted his liability under the latter mortgage, nor did he take any steps to disaffirm it until September 7th, 1882. On September 30th, 1882, this action was commenced.

Held, that the mortgage in question was not void, but only voidable, and that the plaintiff's conduct after he came of age, amounted to a ratification of it.

The rule is now well established, that the deed of an infant is not void *ab initio*, but voidable, on his attaining majority. If he wishes to avoid it, he must expressly repudiate his contract within a reasonable time after coming of age, otherwise his silence will be held to amount to an affirmation of it.

Semble, that acts of less moment and significance than are required to avoid the conveyance of a minor, may be sufficient to affirm it.

Semble, [*per* PROUDFOOT, J.,] that it must be presumed that an adult who affirms a deed executed by him in infancy, does so with knowledge of his rights, and of his exemption from liability.

Per BOYD, C. The policy of the law now is generally to allow the infant to suspend his ultimate decision upon questions of benefit or injury, till he is of legal capacity to bind himself as an adult. When he arrives at majority he is clothed with full legal capacity with all its incidents, and, as an adult, has no special protection on the ground of ignorance of the law, and any disaffirmance by him of a deed executed, during minority, should only be given effect to on the terms of his restoring to the other party, as far as possible, any benefit obtained by him during minority. *Foley v. Canada Permanent Loan and Savings Co.*, 38.

2. *Infants—Foreign guardian—Payment of money to.*]—Where one brought action against an executor in this country, to recover legacies bequeathed to infants, resident in Minnesota, of whom he had been appointed guardian by a Probate Court of Minnesota, and it appeared that the duties and powers of guardians under the law of Minnesota were not greater than those of testamentary guardians, or guardians appointed by a Surrogate Court in this country.

Held, that the money must be paid into Court, and not to the foreign guardian.

Semble, that the rule might be modified if the sum were small, and the whole, or nearly the whole, were required for the infant's education and maintenance, or other immediate use. *Flanders v. D'Evelyn*, 704.

Sale or lease of infant's land under Settled Estate Act to provide fund for maintenance.—See WILLS, 5.

INJUNCTION.

1. *Master and servant—Intimidation of servant—Suppression of facts on motion ex parte for injunction—Dissolving injunction on motion to continue—Practice.*—On a motion to continue an injunction the defendant may bring forward such facts as he might if he were moving to dissolve the injunction, and may shew suppression of facts by the plaintiff as a ground for dissolving it, and may thereupon move to dissolve it.

The plaintiffs individually were members of the Master Plasterers' Association and the defendants individually were members of the Operative Plasterers' Association. The plaintiffs did not by their writ state in what character they sued; but by their affidavits filed professed to represent their association, and joined the defendants as representing the operative association. Some of the defendants by threats, intimidation, and violence, prevented one man, who had contracted to work for one of the plaintiffs, from fulfilling his contract, and induced him to leave Toronto, where he had been hired to work, whereby his master suffered injury to his business.

Held, that this entitled the master to an injunction restraining these defendants from so interfering with his servants.

It appeared that previous to the intimidation four workmen had struck work with one W., a member of the plaintiffs' association, because W. had refused to pay one of his workmen the wages demanded for

him by them. Thereupon the plaintiffs' association passed a resolution imposing a fine on any of its members who should employ the four striking workmen, and communicated this to the defendants' association. The latter demanded the rescission of the resolution, and notified the plaintiffs' association that in default the workmen would strike. The resolution was not rescinded and the workmen struck. The intimidation complained of by the plaintiffs followed as a consequence.

Held, that the defendants, by shewing the fact of the resolution of the plaintiffs' association, which the plaintiffs had not divulged on their motion *ex parte* for the injunction, which they now moved to continue, were entitled to have the injunction dissolved.

Held, also, upon the merits, that the plaintiffs were not entitled to the injunction on account of their resolution. *Hynes et al. v. Fisher et al.*, 60.

2. *Interference with process—Contempt of Court—Parties in representative capacity.*—Pending the injunction in this case, (see *ante* p. 60) one P., who was not a party to the action, but was a member of the plaintiffs' association, on behalf of the association, hired one H. to work for him. McCord and Jenkins, members of the defendants' association but not parties to the action, hearing of this went to H. and induced him to refuse to work for P. and to leave Toronto. The Court was of opinion that M. and J. knew of the injunction pending at the time. The plaintiffs did not state by their writ that they sued in any representative character, nor did they sue the defendants in a representative capacity; but the

plaintiffs' affidavits stated that the plaintiffs represented their association and the defendants, theirs. On motion to commit M. and J. for contempt of process of the court.

Held, that the Master Plasterers' Association was not made a party to nor sufficiently represented in the action by the allegations in the plaintiffs' affidavits; and that no act against the plaintiffs individually having been established, M. and J. could not be held guilty of contempt for interference with the association and P.: that though the association might be added by amendment, the injunction would also have to be amended, and in the meantime M. and J. must be acquitted of contempt of the injunction as it now stood, and therefore the motion must fail. *Hynes v. Fisher, McCord and Jenkins' Case*, 78.

3. *Interim injunction—Motion to continue same till appeal.*—An interim injunction will not be granted in aid of a plaintiff, to preserve the subject matter of his action *in statu quo* long enough to enable him to obtain the decision of an Appellate Court on points already decided in other cases, against his contention, in Courts of first instance. *Wyld v. McMaster*, 717.

To restrain railway removing farm crossings.—See RAILWAYS AND RAILWAY COMPANIES, 1.

INSURANCE.

1. *Fire policy—Submission to arbitration—Staying proceedings.*—The defendants required the plaintiff to proceed to arbitration to ascertain the amount of loss under a policy issued by the defendants in favour of

the plaintiff, which contained the statutory condition as to reference to arbitration. The plaintiff was willing to arbitrate as to amount provided the defendants would admit liability for the loss. This the defendants refused to do.

Held, affirming the order of ARMOUR, J., reversing the order of the Master in Chambers, that the defendants were not entitled to a stay of proceedings until the amount had been ascertained by arbitration. *Hughes v. London Assurance Company*, 293.

2. *Marine insurance—Re-insurance—Contract in accordance with rules—Seaworthiness—Total loss—Abandonment—General average—Particular average—Costs.*—On 1st September, 1881, the plaintiffs insured the vessel *Mary Merritt* for \$6000 for fifteen days, by acceptance of an application made to them by M. the owner. On the same day a memorandum was written in the margin of the application and signed by the manager and secretary of the defendant company, that they covered one fourth, subject to survey and approval at first port of arrival, &c. It was understood that there was an allowance of 8 per cent. for particular average. On 4th April, 1881, an agreement had been entered into between the companies under which defendants were to cover a fourth part of all vessel risks accepted by plaintiffs: but it was expressly agreed that the risks covered were only on hulls of vessels not classed below B. 1.

By defendants' Act of Incorporation, 35 Vic. ch. 103, D., all policies, instruments, &c., issued or entered into by defendants, were to be signed by the president or vice-president, and counter-signed by the

manager and secretary, or as otherwise directed by the rules and regulations of the company in case of their absence, and so signed they should be deemed valid, &c.

Held, that the plaintiffs could not rely on the agreement of the 4th April, as it was limited to vessels not below B. 1, and the vessel insured had not been classed; but that the contract was contained in the memorandum written in the margin of the application, and that it was so signed as to be binding on the defendants, for that, in the absence of evidence to the contrary, it must be deemed to be signed in accordance with the rules and regulations of the company.

It appeared that the vessel was driven ashore on the 6th September, and that the plaintiffs got her off and towed her to Detroit, where she was put into dry dock and repaired. The salvage charges amounted to \$4000. On 26th September, the owner gave notice of abandonment, and claimed as for a total loss, and the plaintiffs settled with him for \$3000. On 29th September the vessel was libelled for seaman's wages and salvage charges, and was subsequently sold to pay same. The actual damage done to the vessel only amounted to \$175. At the time of the accident the vessel had only one anchor, having a short time previously lost a second one she had. There was no express warranty of seaworthiness.

Held, that the policy being a time policy there was no implied warranty of seaworthiness.

Held, also, (1), defendants as reinsurers were not bound by the plaintiffs' settlement with the owner or the acceptance of the notice of abandonment, and that as to them there had been no total loss and no valid abandonment; (2) defendants

were liable as upon a general average for expenses incurred by plaintiffs as salvors and insurers in saving the ship, after deducting the proportion to be borne by the owners of the vessel and cargo, &c.; (3) there was no particular average for which defendants were liable to contribute.

The pleadings were directed to be amended according to the findings; and the costs apportioned. *The Phoenix Insurance Co. v. The Anchor Insurance Co.*, 524.

By Friendly Society.]—See CORPORATIONS, 2.

INTEREST.

Interest on balance retained by executors.]—See WILLS, 1.

On legacies.]—See WILL, 7.

JUDICATURE ACT.

Demurrer for want of parties under.]—See CHURCHES, 1.

In relation to Division Courts.]—See DIVISION COURT, 1.

Third party.]—See THIRD PARTY, 1.

Separate appeals to Divisional Courts and Court of Appeal by different parties in the same interest.—See CARRIERS, 1.

Sec. 16, sub-sec. 3.]—See DOWER, 1.

Sec. 17, sub-sec. 10.]—See DOWER, 1.

Sec. 17, sub-sec. 5.]—See REGISTRY LAWS, 1.

Rules 103.]—See REGISTRY LAWS, 1.

Rule 189.]—See CHURCHES, 1.

Rules 482, 483.]—See NEW TRIAL, 1.

JUSTICES OF THE PEACE.

1. *Conviction—Prior Conviction—Refusal to receive evidence of—Costs.]—*A warrant was issued by a magistrate for the apprehension of the defendant, who was brought before another magistrate thereon, convicted and fined. Subsequently the magistrate who had issued the warrant caused the defendant to be summoned before him for the same offence, and again convicted and fined him, after refusing to receive evidence of the prior conviction.

The Court quashed the second conviction, with costs.

Held, that, even assuming that the first conviction was void by reason of the defendant having been brought before a magistrate other than the one who issued the warrant, his appearance and pleading thereto amounted to a waiver, and at any rate the magistrate who convicted the second time could not take advantage thereof. *Regina v. Bernard*, 603.

See BAWDY HOUSE, 1.

Jurisdiction in cases of gambling.]—See GAMBLING, 1.

LANDLORD AND TENANT.

Act of tenant without knowledge or sanction of landlord—Effect of.]—See WAY, 1.

Liability of tenant to protect chattel mortgage.]—See DISTRESS, 1.

LEGACIES.

Cumulative.]—See WILL, 4.

LIEN.

See MECHANIC'S LIEN, 1.

LIMITATIONS OF ACTIONS AND SUITS.

1. *Contract of hiring—Limitation of action—Evidence—New trial—Statute of Limitations.]—*The plaintiff's testator was chief engineer of the defendant company from its inception until arrangement made by the company with one B. for the completion of the road by B., he paying all expenses, &c., including the engineer's salary. In 1881 the testator wrote a letter to the solicitor for the Grand Trunk Railway Company, which company was about to resume control of the defendants' railway, claiming for services rendered the defendant company up to the middle of 1875. The action was commenced in February, 1882, for services rendered from 1871 to 1875. At the trial an amendment was made allowing the plaintiff to claim for services rendered up to 1880. It appeared that the testator was to have had a salary, but the amount was never fixed. During the period from 1875 to 1880 or 1881 he performed services as engineer for the defendant company, certifying to work done, that the company might obtain bonuses, attending meetings and deputations. He also approved of plans of a bridge submitted to him, and in 1878 signed the specifications appended to the contract between the company and B.

Held, HAGARTY, C. J., dissenting, that there was evidence to go to the

jury of a continuing employment of the testator subsequent to 1875, and of services rendered as chief engineer within the six years preceding action, notwithstanding the letter written by the testator claiming for services up to 1875 only; and that any inference to be drawn from the writing of the letter was for the jury and not for the Judge to draw; and a nonsuit was set aside.

Per HAGARTY, C.J.—The evidence shewed that the testator, though nominally chief engineer of the defendant company subsequent to the contract with B., was in fact working for B. to whom he looked for payment.

The effect of letters written by the company's president after the original claim had been barred, and of reports made to the company of claims against them in which the plaintiff's claim was included, discussed as to their sufficiency to revive the claim. *Shanly, Executrix of Shanly v. Grand Junction R. W. Co.* 156.

2. *Statute of Limitations—Offer to purchase—Estoppel.*—In 1853 M., the owner of the land in question, conveyed it to P. D., who in 1859 conveyed it to L. D. Neither P. D. nor L. D. ever entered into occupation of the lot, which was a vacant one. In 1855 the defendant, who was a builder, with the knowledge and consent of P. D., used the lot for depositing his building materials on, and had continued to do so ever since, but with the like knowledge and assent of L. D. after his purchase. In 1876 L. D. fenced the lot, leaving a gate for defendant's convenience; he also planted a small portion of it, and allowed soil to be taken from it to level it. In 1877

P. D. was declared insolvent, and S., the assignee in insolvency, filed a bill in Chancery to set aside the deed of 1859 from P. D. to L. D., as having been made in fraud of creditors. In 1879 defendant contracted to purchase the lot from L. D. for \$2,400, on which he paid \$300. In 1880 a decree was obtained setting aside the deed of 1859, which was affirmed on rehearing. This was affirmed on appeal, defendant being surety for L. D. for the costs of the appeal. He had never paid any taxes on the lot. In 1880 nine feet of the lot were sold for taxes, and defendant became the purchaser; but it was redeemed.

Held, under these circumstances the defendant's possession was not such as to give him a title under the Statute of Limitations: that the plaintiff was not shewn to have been dispossessed, or to have discontinued the possession: that the agreement by defendant to purchase was evidence to preclude him from setting up a title by possession against the plaintiff, as was the fact of his having become security for L. D. in supporting his, L. D.'s title. *Donovan v. Herbert*, 635.

As against tax purchaser.—See ASSESSMENT AND TAXES, 4.

LOTTERY.

1. *Lottery Act, C. S. C. ch. 95.*—The defendant, being the proprietor of a newspaper, advertised in it that whoever should guess the number nearest to the number of beans which had been placed in a sealed glass jar in a window on a public street, should receive a \$20 gold piece, the person making the next nearest guess, a set of harness; and the person making

the third nearest guess, a \$5 gold piece; any person desiring to compete to buy a copy of the newspaper, and to write his name and the supposed number of the beans on a coupon to be cut out of the paper. The defendant was convicted of a contravention of C. S. C. ch. 95.

Held, that as the approximation of the number depended as much upon the exercise of skill and judgment as upon chance, this was not a "mode of chance" for the disposing of property within the meaning of the Act.

Per HAGARTY, C. J.—The Act applies to the unlawful disposal of some existing real or personal property. In this case there were no specific gold coins, nor was there any particular set of harness, to be disposed of, which might have been forfeited pursuant to section three of the Act, and therefore the conviction was bad on that ground. *Regina v. Dodds*, 390.

LORD'S DAY.

See SUNDAY, 1.

MANUFACTURES.

Mortgage to corporation to secure carrying on of manufactures.—*See* MUNICIPAL CORPORATIONS, 1.

MARINE INSURANCE.

See INSURANCE, 2.

MASTER AND SERVANT.

Intimidation of servant.—*See* INTIMIDATION, 1.

Government official.—*See* SUNDAY 1.

Solicitor of railway company—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

MECHANICS' LIEN.

1. *Mechanics' liens—Suit by unregistered lienholders—Dismissal of—Right of registered lienholder to intervene.*—Under sec. 15 of the Mechanics' Lien Act, R. S. O. ch. 120, suits brought by a lienholder shall be taken to be brought on behalf of all lienholders of the same class; and in case of the plaintiff's death, or his refusal or neglect to proceed, the suit may, by leave of the Court, be prosecuted by any lienholder of the same class.

A number of unregistered lienholders brought an action under the Act to enforce their liens against one G., which proceeded to the close of the pleadings, and was then dismissed with the plaintiffs' assent. P., the assignee of a registered lienholder, relying on the action, took no steps to enforce his lien or to register a certificate within the 90 days, under sec. 21. On being informed of the dismissal of the action, he applied to be allowed to intervene as plaintiff and to prosecute the suit on his own behalf.

Held, GALT, J., dissenting, reversing the judgment of Hagarty, C. J., which affirmed the judgment of the Master in Chambers, that the applicant should be allowed to intervene and prosecute the action; and that the applicant was of the same class as the plaintiffs, in that they all contracted with or were employed with G.

Lienholders "of the same class" are those who have contracted with the same person, whether their liens are registered or not.

Per GALT, J.—The applicant was not of the same class as the plaintiff's, for he was a registered lienholder and came within sec. 21, whereas they were unregistered and came within sec. 20; and the 90 days having expired the applicant's lien was gone, so that even if the plaintiff's suit were still pending the applicant could not have become a party to it. *McPherson et al. v. Gedge, The Scottish Land Company, and Mutton*, 246.

MEMORANDA.

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MINES.

Expropriation by railways.]—See RAILWAYS AND RAILWAY COMPANIES, 5.

MORTGAGE.

1. *Matters of account—Evidence—Bank Draft—Presumption—Mortgage to secure running account—Amendment in Master's Office—Fraudulent preference—Innocent lender.*]—J. and R., living at P., had dealings extending over several years with D., who lived at K., and borrowed money from time to time. To secure the money borrowed they executed a mortgage to D., purporting to be for \$4,000, but really intended as security for whatever should be due to them from time to time on the loan account. On taking the accounts in the Master's office some years afterwards, and after J. and R. had made an assignment in insolvency, it appeared that shortly after executing this mortgage, and before so much as \$4,000 had been advanced

by D., J. and R. drew on D. for \$1,500.

Held, that under these circumstances, the presumption that D. owed J. and R. the \$1,500 drawn for, was rebutted, the draft being the natural mode in which J. and R. would procure an advance on the security of the mortgage to D.

It appeared, also, that during the pendency of these transactions D. gave J. and R. a mortgage, held by him, to collect, and that J. and R. collected what was due on this mortgage, and retained the same.

Held, that the money so collected and retained was covered by the mortgage from J. and R. to D. *Court v. Holland et al.*, 688.

2. *Mortgagor and mortgagee—Accounting—Costs.*]—Where a mortgagee sold under a power of sale in his mortgage, and the mortgagor afterwards brought action against him for an account, and payment over to him, of the surplus which he alleged was in the mortgagee's hands, and on taking the account it was found a balance of \$136 was payable to the mortgagor.

Held, that the mortgagee must pay to the mortgagor his full costs of suit. *Boulton v. Rowland*, 720.

Mortgage to municipal corporation to secure the carrying on of a manufactory.]—See MUNICIPAL CORPORATIONS, 1.

Mortgage by infant—Confirmation of.]—See INFANT, 1.

MUNICIPAL CORPORATIONS.

1. *Mortgage—Forfeiture—Condition to carry on factory—Municipal law—R. S. O. ch. 174, sec. 454.*]—Where the plaintiff, a municipal

corporation, passed a by-law to raise \$20,000, to be given to the defendant to aid him in carrying on certain manufactures in the municipality, subject to a condition that he should give a mortgage on the premises for \$10,000, and a bond for a further sum of \$10,000, which said securities should be conditioned for the carrying on of such manufactures for twenty years, and that during the said period he should keep invested at least \$30,000 in the factory; and the defendant gave the bond and mortgage, conditioned as agreed, but the latter not specifying for what sum it was a security, and invested the \$30,000, but did not carry on the manufactures as agreed.

Held, that R. S. O. ch. 174, sec. 454 authorized the taking of the mortgage by the corporation: that it must be taken to be not a charge for any specific sum, but a security for any damages the plaintiffs might have sustained by the defendant's default, to an extent not greater than \$10,000; that the Court would relieve against a forfeiture of the estate; and there should be a reference to ascertain the amount of the said damages, and on non-payment, a sale of the premises. *The Corporation of the Village of Brussels v. Ronald et al.*, 1.

2. *Municipal by-law—Fire limits—Repairing wooden buildings—Ultra vires.*—A city corporation passed a by-law under R. S. O. ch. 174, sec. 467, sub-sec. 6, which defined fire limits, within which buildings were to be of incombustible material; the roofs to be of certain metals, or slate, or shingles laid in mortar not less than half an inch thick, and no roof of any building already erected within the fire limits to be relaid or recovered except with

one of the enumerated materials. The defendant was convicted of a breach of this by-law, for having laid new shingles on his wooden house within the fire limits, without laying them in mortar. The house had been standing for many years before the by-law was passed.

Held, that the by-law was *ultra vires*, in so far as it referred to existing buildings or ordinary repairs or changes thereof, not being additions thereto. *Regina v. Howard*, 377.

3. *Municipal Council—Public Health Act—Powers thereunder—By-law—Validity of—Delegation of powers.*—The members of the Council of any municipality are health officers of the municipality by virtue of the Public Health Act, R. S. O., ch. 190, and as such they may enforce the provisions of secs. 3 to 7 of that Act without by-law; but if they delegate their powers to a committee, they must do so by municipal by-law. They cannot, however, delegate any powers except those which they exercise under the Public Health Act.

A by-law was passed by the municipal Council of the city of Brantford regulating the cleansing of privy-vaults, and imposing a fine of not less than \$1, nor more than \$50 for a breach of its provisions.

Held, valid, as the by-law was one under the Municipal Act, and not under the Public Health Act, which restricts the penalty to \$20.

The by-law, as set out below, was objectionable, as delegating to persons not members of the Council, the Board of Health, the powers which, as municipal matters, belonged exclusively to the Council. *In re Mackenzie and the corporation of the city of Brantford*, 382.

4. *By-law for weighing and measuring wood—Delivery in specified waggons—Ultra vires.*—The municipal council of the city of Hamilton passed a by-law that no person should, upon or after sale thereof, deliver any stove wood in or from any waggon, &c., otherwise than in or from a waggon of a certain capacity, the sides of which should be constructed of slats of a certain width and a certain distance apart from each other. The defendant was convicted of a breach of the by-law.

Held, that the by-law was *ultra vires*, for though the council had the right under the Municipal Act, R. S. O. ch. 174, sec. 466, to provide for the weighing or measuring of wood, they had no power to enforce delivery, upon or after sale, in a particular kind of waggon. *Regina v. Smith*, 401.

As parties to action to cancel invalid tax deed.—See **ASSESSMENT AND TAXES**, 3.

NEGLIGENCE.

Jumping off train in motion.—See **RAILWAYS AND RAILWAY COMPANIES**, 2.

Condition against liability for, in bill of lading.—See **CARRIERS**, 1.

NEW TRIAL.

1. *Action for dower — Motion to set aside report — Time for moving.*—The report in an action of dower was filed on 29th May, during the Easter Sittings of the Court. A motion was made against it within the first four days of the Michaelmas Sittings.

Held, that the motion was too late, for it should have been made to a Vacation Judge under Rule 483 and 483. *Giles v. Morrow*, 649.

NOTICE.

Of actual travelled way.—See **WAY**, 1.

ONUS.

Under defence of Stamp Act.—See **BILLS AND NOTES**, 1.

PARLIAMENT.

1. *Penalty—Forfeiture — Action for—Election Act of Ontario—R.S.O. ch. 10.*—In an action under R. S. O. ch. 10, sec. 182, against an agent for the sale of Crown Lands to recover a penalty alleged to have been incurred by voting at an election of a member to the Legislative Assembly, contrary to sec. 4 of the Act.

Held, overruling a demurrer to the statement of claim, that, though forfeitures and penalties belong to the Crown unless otherwise disposed of, the sum declared to be forfeited by sec. 4 of the Act, for a breach thereof, is a penalty within the meaning of sec. 182, sub-sec. 1, for which an action may be maintained by any person who will sue for the same. *Shrigley v. Taylor*, 396.

Contempt of court in respect of election petition.—See **CONTEMPT OF COURT**, 1.

PARTIES.

Dumurrer for want of.—See **CHURCHES**, 1.

Mortgagees as parties to action for slander of title.—See REGISTRY LAWS, 1.

In an action to set aside a conveyance as a fraudulent preference.—See FRAUDULENT CONVEYANCE, 1.

Adding parties—See BANKRUPTCY AND INSOLVENCY, 3.

In representative capacity.—See INJUNCTION, 2.

Those against whom defendants have a remedy over not necessary parties.—See ASSESSMENT AND TAXES, 3.

In action to restrain forfeiture of stock for non-payment of calls.—See CORPORATIONS, 3.

PARTNERSHIP.

Assignment of stock in trade by one partner in partnership name, at request of co-partner.—See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

Action against administrator of deceased partner for fraud of his co-partner committed after his decease.—See FRAUD, 1.

Assignment for creditors—Trust to pay partnership debts only.—See BANKRUPTCY AND INSOLVENCY, 2.

PAYMENT INTO COURT.

Of legacies of infants—Foreign guardian.—See INFANTS, 2.

PENALTY.

For illegal voting at Provincial elections.—See PARLIAMENT, 1.

PLEADING.

1. *Pleading—Admission in.*—A bill was filed by D. D. against I. and B. (trading as partners), and J. D., alleging a wrongful conversion by I. and B. of certain timber, the property of the plaintiff, and further alleging that J. D. was a party to an agreement set forth therein respecting the sale of the said timber, as a surety only, and claiming the return of the timber, an account, and damages. I. and B. in their answer admitted that the timber had been removed by them but alleged that it had been in accordance with an agreement entered into by them with J. D. and with A. his assignee, who had proper authority for that purpose :

Held, [reversing the decision of Ferguson, J.] that the whole of the admission was to be looked at, and it was not such as entitled the plaintiff to a decree, because it did not admit a conversion of timber of which the plaintiff was sole owner as alleged in the bill ; but, under it, I. and B. might show that J. D. had an interest in the timber, and authority to act for and represents D. D. in the transaction in question. *Dovey v. Irwin et al.*, 8.

2. When a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue ; therefore, it was competent for one of the defendants in this case to deny the execution of the bond in question herein, his pleading not expressly admitting it. *The Waterloo Mutual Insurance Company v. Robinson and Clark*, 295.

See CHURCHES, 1.

In action against Friendly Society for recovery of endowment money on policy—Amendment of at trial for purpose of setting up forfeiture of policy.]—See CORPORATIONS, 2.

PLEDGE.

As distinguished from a factor.]—See COMMISSION MERCHANTS, 1.

POWER OF SALE.

Of factor.]—See COMMISSION MERCHANTS, 1.

PRACTICE.

On motion to continue injunction.]—See INJUNCTION, 1, 3.

Time for moving against report—Action of Dower.]—See NEW TRIAL, 1.

Change of place of trial.]—See VENUE, 1.

In garnishee proceedings in Division Court.]—See DIVISION COURT, 1.

Trial of issues between defendant and third party in County Court.]—See THIRD PARTY, 1.

See ASSESSMENT AND TAXES, 2.

In respect of the enforcement of Mechanics' Lien.]—See MECHANICS' LIEN, 1.

Separate appeals to Divisional Court and Court of Appeal by different parties in the same interest.]—See CARRIERS, 1.

PRESUMPTION.

Presumption of knowledge of legal rights.]—See INFANT, 1.

Of debt arising from fact of one drawing upon another.]—See MORTGAGE, 1.

PRINCIPAL AND AGENT.

Purchasing agent of railways.]—See RAILWAYS AND RAILWAY COMPANIES, 1.

See COMMISSION MERCHANT, 1.

Delegation of powers by health officers.]—See MUNICIPAL CORPORATIONS, 3.

Brokers buying and selling on margin.]—See GAMBLING, 2.

PRINCIPAL AND SURETY.

See GUARANTEE AND INDEMNITY, 1.

Surties for Town Collector.]—See ASSESSMENT AND TAXES, 2.

PROHIBITION.

To Division Court on ground of want of jurisdiction after lapse of time for taking the objection in the court below.]—See DIVISION COURT, 1.

Damages above jurisdiction—General abandonment.]—See DIVISION COURTS, 2.

PUBLIC HEALTH.

Health officers—By-law regulating cleansing of privy vaults—Delegation of powers by.]—See MUNICIPAL CORPORATIONS, 3.

RAILWAYS AND RAILWAY COMPANIES.

1. *Railways—Farm crossings—Purchasing agent of railways—Executed agreement—Injunction—C. S. C., ch. 66, sec. 13 seq.—41 Vic. ch. 27, D.*—Where the defendants, a railway company, through their right of way agent, purchased certain land for the railway from the plaintiff, and verbally agreed with him at the time to make and maintain certain over and under crossings across the railway to be built on the land so purchased, whereupon the plaintiff conveyed the land to them, for a less sum than he otherwise would have done, and for more than ten years the defendants maintained the crossings as agreed, but afterwards caused some to be filled up or obstructed :

Held, that, whether the agent had authority to make such an agreement or not, the plaintiff was entitled to damages and an injunction to restrain the defendants' from interfering with the crossings, for the company had recognised the agreement, and adequate compensation could not be given to the plaintiff in damages, and, moreover, farm crossings, when once made by a railway company, must, under C. S. C. ch. 66, sec. 13 seq., which was incorporated in the defendants' charter, be maintained by it, and this independently of any agreement for permanent maintenance, although it is otherwise as to stations.

Held, also, that 41 Vic. ch. 27, D., does not give the mortgagees, under the arrangement sanctioned thereby, any power to destroy a farm crossing given in consideration of the purchase of land by the railway, or authorize them to interfere with rights which the railway company are bound to respect.

Semble, that public convenience could not prevail over the plaintiff's private rights.

Semble, also, that agents for the purchase of the right of way for railways, have, as naturally incident to their appointment as such agents, power to agree what crossings shall be given.

Jessup v. Grand Trunk R. W. Co., 7 App. 128, and *Schliehaut and Oxford v. Canada Southern R. W. Co.*, 28 Gr. 236, distinguished. *Clouse v. Canada Southern R. W. Co.*, 28.

2. *Negligence—Contributory negligence.*—The plaintiffs, husband and wife, were on a train of the defendants, going to Lefroy. The conductor, before reaching the station, announced that the next station was Lefroy. On approaching the station the train, according to the plaintiff's witnesses, was slowed, but did not stop. The husband got off while the train was moving slowly, and his wife, seeing that the speed was increasing, and that they were passing the station, sprang after him, though he had let go of her hand, and told her not to jump, and was injured. It was left to the jury to say whether she had acted imprudently in so doing, and they found a verdict for the plaintiffs.

Held, that the question of contributory negligence was properly left to them, and the Court refused to disturb the verdict. *Edgar and Wife v. Northern R. W. Co.*, 201.

3. *Railway companies—Amalgamation—Enforcing decree obtained prior to amalgamation.*—Part of the consideration for the right of way over plaintiff's land was that the company, the Belleville and North

Hastings Railway Company, should construct a cattle pass under the railway, for the use of the plaintiff. The company refused to construct the pass, whereupon the plaintiff, on the 30th April, 1880, filed a bill in Chancery against them to enforce the agreement, to which the company on the 13th September, 1880, filed an answer, and on the 13th November, a decree was obtained by consent to construct it on certain terms specified therein. In March, 1879, the Acts, 42 Vic. chs. 53 and 57, O., were passed, authorizing the Belleville and North Hastings Railway Company, and the defendants to enter into an agreement for amalgamation subject to the ratification and approval of a majority of the shareholders of said companies, at public meetings called for such purpose. On the 29th June, 1880, an agreement was entered into for the amalgamation of the two companies under defendants' name, which was on the same day ratified and approved of by the respective shareholders. The plaintiff had no notice or knowledge of the deed of amalgamation, or of its contents. On the 4th March, 1881, the Act 44 Vic. ch. 64, O., was passed, by sec. 1, of which the said deed of amalgamation was declared legal and valid, and that the two companies should be amalgamated and united under the defendants' name in the terms of the said deed. The decree not having been carried out, the plaintiff brought this action against the defendants to enforce it.

Held, that there was no complete amalgamation of the two companies until the passing of 44 Vic. ch. 64, O., so that the Belleville and North Hastings Railway Company had not ceased to exist when the decree was made, which was therefore legal and

valid; and that the plaintiff was entitled to maintain this action to enforce it against the defendants. *Targy v. The Grand Junction Railway Company*, 232.

4. *Company—Directors—By-law—Appointment of solicitor—Repeal of by-law by shareholders—Payment by salary—C. S. C. ch. 66, sec. 47.*]

—Where the directors of a railway company passed a by-law enacting that the salary of the plaintiff, as solicitor of the company, should be fixed at \$1,000 per annum, which by-law was afterwards, at a meeting of shareholders, repealed:

Held, that the by-law was within the competence of the directors, under C. S. C. ch. 66, sec. 47, and the shareholders could not undo the arrangement in respect of past services of the solicitor received by them.

Without express power it is the right of the directors of a railway company to appoint necessary officers and agents of the company, and to provide for the manner of their payment.

The agreement to pay a solicitor a fixed sum as a yearly salary, in lieu of paying items in detail, is neither illegal nor unusual, whether it provides for the past or the future. *Falkiner v. Grand Junction R. W. Co.*, 350.

5. *General Railway Act—Compulsory purchase—Mines—Injunction—County Judge's order for immediate possession—R.S.O. ch. 165, sec. 20, sub-sec. 23.*]

—Where the special Act of a railway company incorporated the clauses of the General Railway Act relating to powers, plans, and surveys, and lands and their valuation, and also authorized the company from and out of the ores obtained along their line of railway, to

manufacture iron and steel for their own use, and to acquire mining properties by purchase; and the company had chosen a site for a station upon the lands of the plaintiffs, covering a valuable mine of magnetic iron ore, and called upon the plaintiffs to arbitrate, and the plaintiffs were unwilling to part with the land.

Held, that the plaintiffs could not obtain an injunction restraining the company from expropriating the land in question, even though it were conceded that the company knew of the mine, and that it was the property of the plaintiffs, for the Legislature had left the expropriation clauses to their full effect, which in this country at least, enables the company to acquire the fee of the land.

Aliter, if it were proved that the company were acquiring the land not for the purposes for which the powers were given, but for some collateral object, as for example, with the object of afterwards selling it to a third party.

Semble that, if it should afterwards appear that such a scheme was actually in contemplation, and had been carried out, means might be found to frustrate it.

Semble, also, that the powers conferred on the County Judge under the Railway Act of Ontario, R.S.O. ch. 165, sec. 20, sub-sec. 23, of ordering immediate possession, before arbitration had, do not exclude the jurisdiction of this Court to enjoin the taking of possession, if the company is making use of their powers to attain any object collateral to that for which it was incorporated; but otherwise it is not within the jurisdiction of a Judge of this Court to interfere with an order of the County

Judge, though granted *ex parte*. *Jenkins et al. v. Central Ontario R.W. Co.*, 593.

Tax sale of.—ASSESSMENT AND TAXES, 4.

REGISTRY LAWS.

1. *Slander of title—Liability of solicitor for tort—Duty of registrar—Reasonable and probable cause—Pleading—Parties—R. S. O. ch. 73, sec. 1—Ib. ch. 111, sec. 2; O. J. A. sec. 17, sub-sec. 5—Rule 103.*—On June 7th, 1882, G. A. S., acting on the advice of and through H. E. C., his solicitor, presented to C. L., Registrar of the City of Toronto, for registration, a document, which, after stating that he claimed certain lands and premises, (describing them) or some estate, right, title or interest therein, continued: "and upon the decease of G. S., a lunatic, proceedings if necessary will be instituted to assert and establish my title and claim thereto, and all persons are hereby notified and cautioned against dealing with the said property or any part thereof, and any person or persons committing waste or damage to said lands and premises will be held responsible therefore and damages claimed accordingly. As witness &c., (signed) G. A. Shaw:" and C. L. accordingly registered the same. The plaintiffs, as owners of the property in question, subject to certain mortgages to persons not made parties to this action, now brought action against G. A. S., H. E. C. and C. L., claiming cancellation of the said registered instrument, damages for the registration thereof, and an injunction to restrain H. E. C. and G. A. S. from doing further acts of injur

to or slander of their title. As to H. E. C. and G. A. S., they alleged that these defendants acted "maliciously and for the purpose of slandering and injuring their title to the lands, and preventing them selling the same," but as to C. L. merely that he acted "carelessly and negligently" in causing the paper to be registered. The evidence shewed that the document was registered for the purpose of preventing the plaintiffs dealing with the land, and of asserting a supposed title to the property, and that it was done without reasonable or probable cause.

Held, that the instrument was not properly registrable within R. S. O. ch. 111, sec. 2; and G. A. S. and H. E. C. were alike liable in damages for the registration of the same.

Held, however, as to C. L. he was protected by R. S. O. ch. 73, sec. 1, inasmuch as it was not alleged that he had acted maliciously and without reasonable and probable cause.

It is not to be expected that registrars should take advice when any dubious instrument is presented to them for registration, whether it is such as contemplated by the registry law.

In torts the principle of agency does not apply; each wrongdoer is a principal.

Held, also, that it was not necessary for the mortgagees to be made parties to the action, especially since Rule 103 of the Judicature Act. *The Ontario Industrial Loan and Investment Co. v. Lindsey et al.*, 473.

RE-INSURANCE.

Not bound by agreement of original insurers entered into with the owner of the property insured to which they have not assented.]—See INSURANCE, 2.

REPAIRS.

Repairs by tenant for life.]—See WILLS, 5.

REPLEVIN.

Undertaking by plaintiff in replevin to answer for goods sold by him after giving of the same.]—See EXECUTION, 1.

RESTRAINT AGAINST ANTICIPATION.

See HUSBAND AND WIFE, 1.

SABBATH.

See SUNDAY, 1.

SALE OF LAND.

See GUARANTEE AND INDEMNITY, 1.

Sale or lease of infant's lands under Settled Estate Act, to provide fund for maintenance.]—See WILLS, 5.

SCOTT ACT.

See CANADA TEMPERANCE ACT, 1878.

SETTLED ESTATE ACT.

Sale or lease of infant's land to provide fund for maintenance.]—See WILLS, 5.

SLANDER OF TITLE.

See REGISTRY LAWS, 1.

STAMPS.

Stamp Act.]—See **BILLS AND NOTES**, 1.

STATUTES.

Construction of—Repeal of.]—See **BILLS AND NOTES**, 1.

STATUTE OF FRAUDS.

What is sufficient to satisfy fourth section.]—See **GUARANTEE AND INDEMNITY**, 1.

STATUTES.

12 *Geo. II. ch. 28.*]—See **GAMBLING**, 1.

27 *Geo. III. ch. 1, sec. 2.*]—See **GAMBLING**, 1.

Imp. 19-20 Vic. ch. 120.]—See **WILL**, 5.

Imp. 30-31 Vic. ch. 3, sec. 92, sub-sec. 13, 14, 16.]—See **CONSTITUTIONAL LAW**, 1.

31 *Vic. ch. 1, D. secs. 3, 7.*]—See **BILLS AND NOTES**, 1.

31 *Vic. ch. 76, D.*]—See **CONSTITUTIONAL LAW**, 1.

32 *Vic. ch. 36.*]—See **ASSESSMENT AND TAXES**, 4.

32-33 *Vic. ch. 16.*]—See **BANKRUPTCY AND INSOLVENCY**, 3.

32-33 *Vic. ch. 19, D.*]—See **EXTRADITION**, 1.

32-33 *Vic. ch. 32, D.*]—See **BAWDY HOUSE**, 1.

38 *Vic. ch. 16, D.*]—See **BANKRUPTCY AND INSOLVENCY**, 1.

40 *Vic. ch. 25, D.*]—See **EXTRADITION**, 1.

41 *Vic. ch. 16, D.*]—See **CANADA TEMPERANCE ACT, 1878**.

41 *Vic. ch. 27, D.*]—See **RAILWAYS AND RAILWAY COMPANIES**, 1.

C. S. C. ch. 66, sec. 13 seq.]—See **RAILWAYS AND RAILWAY COMPANIES**, 1.

C. S. C. ch. 66, sec. 47.]—See **RAILWAYS AND RAILWAY COMPANIES**, 4.

C. S. C. ch. 95.]—See **LOTTERY**, 1.

R. S. O. ch. 10, sec. 182.]—See **PARLIAMENT**, 1.

R. S. O. ch. 40, sec. 85.]—See **WILL**, 5.

R. S. O. ch. 47, sec. 134.]—See **DIVISION COURT**, 1.

R. S. O. ch. 55, secs. 10, 20, 23, 25.]—See **DOWER**, 1.

R. S. O. ch. 73, sec. 1.]—See **REGISTRY LAWS**, 1.

3 *Vic. ch. 74.*]—See **CHURCHES**, 1.

R. S. O. ch. 95, sec. 4.]—See **HUSBAND AND WIFE**, 1.

R. S. O. ch. 95, sec. 13.]—See **FRAUDULENT CONVEYANCE**, 1.

R. S. O. ch. 111, sec. 2.]—See **REGISTRY LAWS**, 1.

R. S. O. ch. 118.]—See **BILLS OF SALE AND CHATTEL MORTGAGES**, 2.

R. S. O. ch. 119.]—See **BILLS OF SALE AND CHATTEL MORTGAGES**, 2.

R. S. O. ch. 120, sec. 15.]—See **MECHANICS' LIEN**, 1.

R. S. O. ch. 150, secs. 37, 41.]—See **CORPORATIONS**, 3.

R. S. O. ch. 165, sec. 20, sub-sec. 23.]—See **RAILWAYS AND RAILWAY COMPANIES**, 5.

R. S. O. ch. 167, sec. 11.]—See **CORPORATIONS**, 2.

R. S. O. ch. 174, sec. 454.]—See **MUNICIPAL CORPORATIONS**, 1.

R. S. O. ch. 174, sec. 466.]—See **MUNICIPAL CORPORATIONS**, 4.

R. S. O. ch. 174, sec. 467, sub-sec. 6.]—See **MUNICIPAL CORPORATIONS**, 2.

R. S. O. ch. 180.]—See **ASSESSMENT AND TAXES**, 1.

R. S. O. ch. 180, sec. 165.]—See **ASSESSMENT AND TAXES**, 3.

R. S. O. ch. 189.]—See **SUNDAY**, 1.

R. S. O. ch. 190, secs. 3-7.]—See **MUNICIPAL CORPORATIONS**, 3.

42 *Vic. ch. 17, sec. 13.*]—See **BILLS AND NOTES**, 1.

42 *Vic. chs. 53, 57, O.*]—See RAILWAYS AND RAILWAY COMPANIES, 3.

43 *Vic. ch. 1, D.*]—See BANKRUPTCY AND INSOLVENCY, 3.

43 *Vic. ch. 8, sec. 14, O.*]—See DIVISION COURT, 1.

44 *Vic. ch. 64, O.*]—See RAILWAYS AND RAILWAY COMPANIES, 3.

45 *Vic. ch. 1.*]—See BILLS AND NOTES, 1.

STATUTORY CONDITION.

In policy of fire insurance.]—See INSURANCE, 1.

SUBSTITUTIONAL GIFT.

See WILL, 3.

SUNDAY.

1. *Lord's Day Act—R.S.O. ch. 189, —The Public Service.*]—*Held*, that R. S. O. cap. 189, which forbids the profanation of the Lord's Day by persons carrying on their ordinary business, does not apply to persons in the public service of Her Majesty, and therefore a conviction of a Government lock-tender on the Welland Canal, for locking a vessel through the canal on Sunday, in obedience to the orders of his superior, was squashed. *Regina v. Berriman*, 282.

TAX SALE.

Where no taxes really in arrear.]—See ASSESSMENT AND TAXES, 3.

Of lands of railway—Minor irregularities.]—See ASSESSMENT AND TAXES, 4.

THIRD PARTY.

1. *County Court action—Third party—Trial of issues between defendant and third party—Investigating accounts beyond pecuniary jurisdiction of County Court—Prohibition.*]—In an action in a County Court on a promissory note made by the defendant, in which the defendant claimed indemnity against the third party, the third party having appeared, the learned Judge of the County Court directed certain issues to be tried between the defendant and the third party. At the trial he found for the plaintiff, and investigated accounts between the defendant and the third party amounting to more than \$10,000, upon which he found that a balance of more than \$3,000 would be payable to the defendant, and he directed that the third party should, out of this balance, pay to the defendant the amount of the plaintiff's claim. On a motion for a prohibition,

Held, that the order directing the issues between the defendant and the third party, and the proceedings taken under it were right.

Held, also, that as the only relief which could be given to the defendant against the third party was protection against the demand of the plaintiff, which was within the pecuniary jurisdiction of the County Court, the learned Judge was not acting beyond his jurisdiction in investigating accounts of sums beyond his jurisdiction. *Neald v. Corkindale and Foster*, 317.

TITLE.

Estoppel against setting up title by possession.]—See LIMITATIONS, STATUTE OF, 2.

TORTS.

Principal of agency does not apply to.]—See REGISTRY LAWS, 1.

TRADES UNION.

Intimidation of employees by.]—See INJUNCTION, 1.

TRESPASS.

Entry on land to maintain action—Possession.]—Actual occupation of land is not essential to give a right to maintain trespass by one who has the legal title. It is sufficient that he enter upon the land so as to put himself in legal possession of it.

Held, that putting up boards on the land by the owner, stating that the land was for sale, was a sufficient entry upon his part to vest the legal possession in him to enable him to maintain formally an action of trespass. *Donovan v. Herbert*, 635.

TRUST AND TRUSTEE.

Disclaimer by cestui que trust—Trust declared in patent.]—See HUSBAND AND WIFE, 1.

Bequest to trustees as a class.]—See WILL, 1.

VENUE.

Verdict subject to reference—Failure of reference—Setting aside verdict and granting new trial—Single Judge—change of venue—Practice.]—A formal verdict was entered at the Ottawa Assizes, subject to a reference which failed through the omission of the arbitrators to enlarge the time.

A Judge in single Court set aside the verdict, and granted a new trial.

The plaintiffs resided in Montreal, and defendant's officers at Picton, and plaintiffs had some witnesses resident in Toronto. It appeared that Toronto was as easily accessible as Ottawa, and that no inconvenience would be occasioned by a change of venue to Toronto. Under these circumstances the change was directed. *Cooper v. The Central Ontario R. W. Co.*, 280.

WAY.

1. *Right of way—Way of necessity—Registration—Notice—Short form deed—Landlord and tenant.*]—B. and W., becoming entitled in 1830, as tenants in common of one hundred acres of land, under a devise, made a partition thereof by agreement, whereby fifty acres were allotted to each in severalty. The fifty acres allotted to B. were land-locked, and there was no way out to the highway, except over the fifty acres of W., over which accordingly B. was allowed by W. to pass at will. In 1840 W. sold to E. the thirty acres of his fifty, next adjoining B.'s fifty acres, and also a strip for a road across the other twenty acres. In 1848 E. granted to the then owner of B.'s fifty acres, a strip for a road along the north side of his thirty acres, and also the strip along W.'s twenty acres conveyed to him in 1840. This made a change in the course of the way theretofore used by B. and his successors, and was thenceforth the course followed by the latter, and was the right of way in question in this action: but this deed was not registered till 1882. B.'s parcel subsequently became vested in the plaintiff, under conveyances granting

not only the land, but also all ways, &c., therewith used and enjoyed. The defendant claimed title to part of W.'s fifty acres by deed made in 1854, without notice, as he alleged, of the deed of 1848. The right of way in question had been used by the plaintiff and his predecessors in title for over thirty years, prior to the obstruction thereof by the defendant, to restrain which this action was brought.

Held, that the effect of the will and agreement together was the same as if the will itself had devised the one half to B., and the the other to W., and the plaintiff had a right of way of necessity over the defendant's land, and was entitled to an injunction to restrain the obstruction complained of; and it was not necessary for him to shew any express grant of the right of way by the defendant, or his predecessors in title.

Held, however, that the right of way would have passed under the grant of the land, and all ways, &c., used and enjoyed therewith, as also under a deed of grant drawn according to the Act respecting short forms of conveyancing, even if it had not been a way of necessity, and no such words were necessary in order to pass a way of necessity.

Held, also, that the subsequent express grant of a right of way by the defendant's predecessor in title, did not destroy the right to a way of necessity.

Held, also, that the defendant having notice of an actual travelled way across his land was affected, also, with notice of the origin, as well as the existence of the right.

Held, also, that changing the locality of the way, from time to time, by the agreement of the respective owners, did not destroy the right of way, nor could the grant of a certain

specific line for the road put an end to the right, in case a purchaser should buy without notice of the grant.

Held, lastly, that any action of a tenant, without the knowledge or sanction of the landlord, could only affect his interest as tenant, and could not prejudice the reversioner.

Semble, that a way of necessity does not give a right to the owner of the dominant tenement to cross any part of the servient tenement at pleasure, but is confined to a definite way to be determined by the agreement of the parties, or by the owner of the servient tenement, or of the dominant tenement in his default. *Dixon v. Cross*, 465.

WASTE.

By life-tenant under will.]— See WILL, 2.

WILLS.

1. *Will*—*Gift to trustees as a class*—*Construction*—*Compensation to executors in addition to bequest of residue*—*Interest on balance retained by executors.*]—Where a testator, after devising certain lands to "my trusty friends J. L. and R. M." on certain trusts for the maintenance and education of his son J. E., and, devising the residue, real and personal, to the said "J. L. and R. M., or the survivor of them," in trust to sell, and distribute the proceeds in payment of certain legacies, therein specified, continued, "should there ultimately be any residue, I direct my said trustees, or the survivors of them, to divide and pay the same to and among my legatees hereinbefore named and my said trustees, or the survivor of them, in even and equal shares and proportions:"

Held, that the trustees took as a class, i.e., one share between them, equal to the shares taken respectively by the legatees; for looking at the whole will, it appeared that the testator was speaking of the trustees in their official capacity, and regarding them as one legal person.

It is a principle of construction that the same meaning shall, as far as possible, be given to the same words in the same will.

Where there is a bequest of a share of the residuary estate to executors it is not to be inferred that the bequest was given in lieu of compensation, as in the case of a legacy of a definite sum, but it is nevertheless one of the elements to be considered in dealing with the question of compensation:

Held, that in this case, the executors were entitled to compensation, notwithstanding a bequest to them of a share of the residue, because the amount of the residue was, when the will was made and after the testator's death, a matter of extreme uncertainty; nevertheless, no percentages should be allowed on the share of the residue, which the executors took under the residuary clause in the will.

Held, also, that the executors, in this case, should be charged with interest upon the residue in their hands after the time when it was distributable: and the annual rate of interest charged accordingly upon it from the time when it might properly have been distributed, or appropriated, down to the time of its actual payment, or if not yet paid down to the present time. *Boys' Home of the City of Hamilton v. Lewis et al.*, 18.

2. *Will — Construction — Devise for life—Impeachment for waste.*—

A testator devised certain lands as follows:—"I will, devise, and bequeath unto my wife for and during her natural life all that parcel of land (describing it) * * I also will and bequeath unto her, my beloved wife, everything, real and personal, within and without; and it is hereby understood that the property above described shall be under the control of my said beloved wife. After the demise of my wife it is my will and pleasure that the aforesaid real estate should descend to my nephew and his heirs." The testator had no other real estate than the said lands, and there was nothing else to which his language, importing that his wife was to have control of everything, real and personal, could be referred.

Held, nevertheless, that the intermediate clause had no effect on the life estate expressly given to the wife, and there was nothing to change or enlarge the usual character of such life estate, so as to render her punishable for waste.

White v. Briggs, 15 Sim. 17, *S. C.* in App. 2 Phil. 583, distinguished. *Clow v. Clow*, 355.

3. *Will—Construction—Codicil—Substitutional gift — "Heirs" — "Children."*—A testator, after making certain bequests to his wife, directed that after her death, his executors should sell all his estate, real and personal, and after providing for certain pecuniary legacies, should give the legal interest on one-fourth of the remaining proceeds of his estate to his daughter E., to be paid to her yearly during her life, and after her death to be divided among her surviving children. By a codicil he willed to "E. and her heirs that share or division of my estate, as referred to in a former

will, in land composed of the north east part of lot 7, concession 3, Markham." It appeared that the testator had put E. in possession of the said fifty acres sometime before his death, and that the said fifty acres were about equal to one-fourth of the whole residue of his estate.

Held, that the devise to E. in the codicil was substitutional for the bequest to her in the will.

Held, also, that under the codicil E. took an estate in fee, and not one subject to the incidents of the original gift in the will.

In no case of substitutional gifts has it been held that the subsequent gift is to go to the parties entitled under the subsequent limitation of the former gift.

The word "heirs" may sometimes mean "children," both in regard to personal and real estate, but that meaning will only be given to it when it is clear that the property was intended to go to the children. *Scott et al. v. Gohn et al.*, 457.

4. *Will—Construction—Cumulative legacies.*—A testator, after directing payment of his debts, and funeral and testamentary expenses, disposed of the residue as follows: "Secondly, I give to my wife \$150 annually, during her natural life, or so long as she may remain my widow, the said sum to be received and accepted by her in lieu of dower, the said yearly allowance to be a lien upon my real estate, and to be paid my said wife as she may need it, either quarterly or half-yearly." He then directed his executors to sell his farm and all his personal property except that previously disposed of, and out of the proceeds: first, to pay his debts, &c., as aforesaid; and to divide the balance then remaining between his two sons, subject to each of them

securing to their mother an annual payment of \$50 during her natural life, the security to be satisfactory to her and his executors.

Held, that there were sufficient points of difference between the first annuity and the subsequent ones, to make it apparent that the several annuities in favour of the widow were intended to be cumulative. *Edwards v. Pearson et al.*, 514,

5. *Repairs by tenant for life—Settled estate—Sale or lease by Court—Settled Estates Act, 1856—Imp. 19-20 Vic. ch. 120—R. S. O. ch. 40, sec. 85.*—J. T. S. devised certain lands to M. H. for life, and afterwards to any child of M. H., who might survive her in fee. M. H. had one child, aged ten, when she petitioned under Imp. 19-20 Vic. ch. 120, claiming to be allowed for expenditure made by her upon two houses on the land for much needed repairs, and lasting improvement, and also for \$100, paid to a tenant for improvements made by him under a promise from the testator that he should be paid for them; and praying for a sale, or power to lease.

Held, that M. H. might be reimbursed the \$100, from the testator's general estate, as this appeared to have been a debt due by the testator; but neither this nor the other expenditure could be charged on the land.

Held, further, it appearing that there was no means from the income of the property of putting it into a sufficiently remunerative condition to support M. H., and her child, it was a proper case for the sale or leasing of the estate, with a right to build.

The repairs of a tenant for life, however substantial and lasting, are his own voluntary act, and do not arise from any obligation, and he

cannot charge the inheritance with them. *Re J. T. Smith's Trusts*, 518.

6. *Will — Construction — Gift of maintenance* “*while donee remains at home.*”]—A testator devised certain lands to his two sons, declaring that the legacies thereafter mentioned should be a charge thereon. He then bequeathed certain pecuniary legacies to his daughters, adding, “I give and devise also unto (his said daughters) their support and maintenance so long as they, or either of them, remain at home with (his two sons);” and he gave his personal property to his two sons in equal shares.

Held, that the support and maintenance of the plaintiffs was, by the will, made a charge upon the lands; and they might for sufficient reasons, cease to live at home, and yet still be entitled to such support and maintenance. *Swainson v. Bentley*, 572.

7. *Will — Construction — Mixed fund for payment of legacies—Interest on legacies—Charitable bequests — Mortmain*]—A testator, after directing payment of his debts out of his personal property, or if that should prove insufficient, then, that so much of his real estate as would supply the deficiency might be sold for that purpose, went on to direct that his land should be sold, and the income of the capital arising from the sale

be paid yearly to his wife, for her maintenance during her natural life, after which he gave a number of charitable bequests and pecuniary legacies, but made no residuary gift:

Held, that the testator had created a mixed fund to answer the purposes of his will, and if the personalty was not sufficient for the payment of the debts, the legacies were payable out of the land; if it was sufficient, they were payable out of the mixed fund; but so far as the charitable bequests were payable out of the land they were void.

Held, also, that interest was payable on the legacies from a year after the testator's death, in accordance with the general rule, in any event; and this, although, as the whole interest of the proceeds of the land was given to the wife for life, the capital had to be kept invested by the executors, and, consequently, there was no fund for the payment of legacies until her death. *Toomey v. Tracey*, 708.

Devise to two as tenants in common — Subsequent partition — Way of necessity.]—See *Wax*, 1.

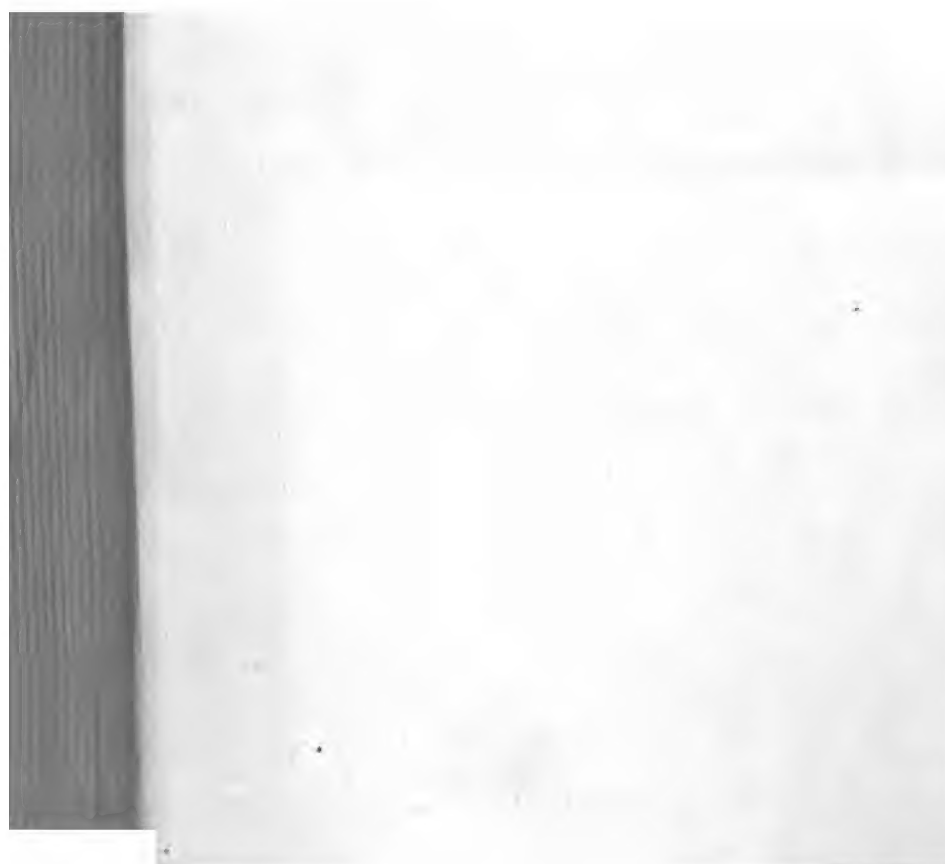
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WORDS.

“*Heirs*” — “*Children*”] — See *WILL*, 3.









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